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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. [redacted] 10

UNITED STATES OF AMERICA, PETITIONER,

vs.

SEABOARD AIR LINE RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 26, 1958

CERTIORARI GRANTED JANUARY 12, 1959

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 540

UNITED STATES OF AMERICA, PETITIONER,

vs.

SEABOARD AIR LINE RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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[fol. 1] [Caption omitted]

[fol. 2] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Civil No. 2364

THE UNITED STATES OF AMERICA, Plaintiff,

v.

SEABOARD AIR LINE RAILROAD COMPANY, Defendant

COMPLAINT—Filed June 4, 1956

1. The United States of America, by Lester S. Parsons, Jr., United States Attorney for the Eastern District of Virginia, brings this action under the Acts of Congress known as the Safety Appliance Acts (U. S. Code, title 45, sections 1 to 16, inclusive), against the Seaboard Air Line Railroad Company, a corporation organized and doing business under the laws of the States of Virginia and North Carolina, and having an office and place of business at Hopewell, Virginia, this action being brought upon suggestion of the Attorney General of the United States, at the request of the Interstate Commerce Commission, and upon information furnished by said Commission.

[fol. 3] For a First Cause of Action

2. Plaintiff alleges that defendant during all the times mentioned herein was a common carrier engaged in interstate commerce by railroad in the State of Virginia.

3. That in violation of the provisions of the U. S. Code, title 45, sections 1 to 10, inclusive, as modified by an order of the Interstate Commerce Commission of June 6, 1910, requiring that whenever any train is operated with power or train brakes

> not less than 85 percent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-

> braked cars in every such train which are associated together with the 85 percent shall have their brakes so used and operated,

defendant, on March 5, 1956, operated on its line of railroad, over a part of a highway of interstate commerce, one train, to wit: its transfer, consisting of twenty-six cars, drawn by diesel locomotive engine No. 1745, said train being one operated with power or train brakes.

4. That on said date defendant operated said train over its line of railroad from Lead Track at Allied Chemical and Dye Company plant westward to Hopewell Yard, in and about Hopewell, Virginia, within the jurisdiction of this court, when none of the cars in said train had their brakes used and operated by the engineer of the locomotive drawing said train, and when less than 85 percent of the cars which composed said train had their brakes used and operated by the engineer of said locomotive engine drawing said train.

5. Defendant is therefore liable to plaintiff in the sum of one hundred dollars.

[fol. 4] For a Second Cause of Action

6. Plaintiff alleges that defendant during all the times mentioned herein was a common carrier engaged in interstate commerce by railroad in the State of Virginia.

7. That in violation of the provisions of the U. S. Code, title 45, sections 1 to 10, inclusive, as modified by an order of the Interstate Commerce Commission of June 6, 1910, requiring that whenever any train is operated with power or train brakes

> not less than 85 percent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-braked cars in every such train which are associated together with the 85 percent shall have their brakes so used and operated,

defendant, on March 5, 1956, operated on its line of railroad, over a part of a highway of interstate commerce, one train, to wit: its transfer, consisting of twenty-eight cars,

drawn by diesel locomotive engine No. 1745, said train being one operated with power or train brakes.

8. That on said date defendant operated said train over its line of railroad from Track No. 5, Hopewell Yard, eastward to Lead Track at Allied Chemical and Dye Company plant, in and about Hopewell, Virginia, within the jurisdiction of this court, when none of the cars in said train had their brakes used and operated by the engineer of the locomotive drawing said train, and when less than 85 per cent of the cars which composed said train had their brakes used and operated by the engineer of said locomotive engine drawing said train.

9. Defendant is therefore liable to plaintiff in the sum of one hundred dollars.

[fol. 5] For a Third Cause of Action

10. Plaintiff alleges that defendant during all the times mentioned herein was a common carrier engaged in interstate commerce by railroad in the State of Virginia.

11. That in violation of the provisions of the U. S. Code, title 45, sections 1 to 10, inclusive, as modified by an order of the Interstate Commerce Commission of June 6, 1910, requiring that whenever any train is operated with power or train brakes

> not less than 85 percent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power braked cars in every such train which are associated together with the 85 percent shall have their brakes so used and operated,

defendant, on March 5, 1956, operated on its line of railroad, over a part of a highway of interstate commerce, one train, to wit: its transfer, consisting of twenty-nine cars, drawn by diesel locomotive engine No. 1758, said train being one operated with power or train brakes.

12. That on said date defendant operated said train over its line of railroad from Track No. 38 near Allied Chemical and Dye Company plant westward to Norfolk and Western Interchange track, thence to Hopewell Yard, in and about Hopewell, Virginia, within the jurisdiction of this court, when none of the cars in said train had their brakes used

and operated by the engineer of the locomotive drawing said train, and when less than 85 percent of the cars which composed said train had their brakes used and operated by the engineer of said locomotive engine drawing said train.

13. Defendant is therefore liable to plaintiff in the sum of one hundred dollars.

[fol. 6] For a Fourth Cause of Action

14. Plaintiff alleges that defendant during all the times mentioned herein was a common carrier engaged in interstate commerce by railroad in the State of Virginia.

15. That in violation of the provisions of the U. S. Code, title 45, sections 1 to 10, inclusive, as modified by an order of the Interstate Commerce Commission of June 6, 1910, requiring that whenever any train is operated with power or train brakes

> not less than 85 percent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-braked cars in every such train which are associated together with the 85 percent shall have their brakes so used and operated,

defendant, on March 6, 1956, operated on its line of railroad, over a part of a highway of interstate commerce, one train, to wit: its transfer, consisting of twenty-three cars, drawn by diesel locomotive engine No. 1758, said train being one operated with power or train brakes.

16. That on said date defendant operated said train over its line of railroad from track No. 3, Hopewell yard, eastward to Lead track, Continental Can Company plant, in and about Hopewell, Virginia, within the jurisdiction of this court, when none of the cars in said train had their brakes used and operated by the engineer of the locomotive drawing said train, and when less than 85 percent of the cars which composed said train had their brakes used and operated by the engineer of said locomotive engine drawing said train.

17. Defendant is therefore liable to plaintiff in the sum of one hundred dollars.

[fol. 7] 18. Wherefore, plaintiff prays judgment against said defendant in the sum of four hundred dollars and its costs herein expended.

Lester S. Parsons, Jr., United States Attorney.

[fol. 8] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION

[Title omitted]

ANSWER—Filed July 2, 1956

(1) Defendant, Seaboard Air Line Railroad Company, admits the allegations contained in paragraphs 1, 2, 6, 10 and 14.

(2) Defendant, Seaboard Air Line Railroad Company, admits that on March 5, 1956, it operated its diesel locomotive engine No. 1745 from the Lead Track at Allied Chemical and Dye Company plant westward to Hopewell Yard in the City of Hopewell, Virginia, with certain railroad cars thereto attached, but denies that said movement was a train movement but rather a switching movement not within the provisions of U. S. Code, title 45, sections 1 to 10, inclusive, as modified by an order of the Interstate Commerce Commission of June 6, 1910, with respect to power or train brakes.

(3) Defendant, Seaboard Air Line Railroad Company, admits that on March 5, 1956, it operated its diesel locomotive engine No. 1745 from Track No. 5, Hopewell Yard, eastward to Lead Track at Allied Chemical and Dye Com-[fol. 9] pany plant, in the City of Hopewell, Virginia, with certain railroad cars thereto attached, but denies that said movement was a train movement but rather a switching movement not within the provisions of U. S. Code, title 45, sections 1 to 10, inclusive, as modified by an order of the Interstate Commerce Commission of June 6, 1910, with respect to power or train brakes.

(4) Defendant, Seaboard Air Line Railroad Company, admits that on March 5, 1956, it operated its diesel loco-

motive engine No. 1758 from Track No. 38 near Allied Chemical and Dye Company plant westward to Norfolk and Western Interchange track, thence to Hopewell Yard, in the City of Hopewell, Virginia, with certain railroad cars thereto attached, but denies that said movement was a train movement but rather a switching movement not within the provisions of U. S. Code, title 45, sections 1 to 10, inclusive, as modified by an order of the Interstate Commerce Commission of June 6, 1910, with respect to power or train brakes.

(5) Defendant, Seaboard Air Line Railroad Company, admits that on March 6, 1956, it operated its diesel locomotive engine No. 1758 from Track No. 3, Hopewell Yard, eastward to Lead Track, Continental Can Company plant, in the City of Hopewell, Virginia, with certain railroad cars thereto attached, but denies that said movement was a train movement but rather a switching movement not within the provisions of U. S. Code, title 45, sections 1 to 10, inclusive, as modified by an order of the Interstate Commerce Commission of June 6, 1910, with respect to power or train brakes.

(6) This defendant denies that it is liable to the plaintiffs in any amount on account of the alleged actions set forth in the first, second, third and fourth causes of action of [fol. 10] the complaint, and particularly in paragraphs 5, 9, 13, 17 and 18 thereof.

Wherefore, this defendant asks judgment of this Honorable Court in its behalf, with its costs herein expended.

The defendant requests a jury trial of this case.

Seaboard Air Line Railroad Company, a Corporation, by Eppa Hunton, IV, Its Counsel.

Certificate of service (omitted in printing).

[fol. 11] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR EASTERN DISTRICT OF VIRGINIA

LETTER—Filed April 4, 1957

April 4, 1957.

Honorable L. S. Parsons, Jr., United States Attorney, Richmond, Virginia.

Eppa Hunton, IV, Esquire, Electric Building, Richmond, Virginia.

GENTLEMEN:

Re: The United States of America v. Seaboard Air Line Railroad Company. Richmond Civil Action No. 2364

Upon consideration of the record, the argument of counsel and the memoranda of arguments and authorities submitted in the above case, I have reached the conclusion that under the facts presented the movements complained of were switching operations rather than train movements and therefore not covered by the Safety Appliance Acts.

I have given consideration to the terms of the statutes and to the case law called to my attention and I am mindful of the purposes and wisdom of the statute involved. I am also conscious of the fact that the safety record of the [fol. 12] defendant and the added cost of operation are not controlling. However they are worthy of consideration along with the other facts.

After considering the cases cited, I find the language used in *United States* v. *C., B. & Q. R. Co., 199 Fed (2d), 223 (9th Cir.)* particularly apt, where the Court said:

> "Neither Congress nor the Interstate Commerce Commission has seen fit to define the meaning of the word "train" as employed in the Act. This perplexing problem unfortunately, so we think, has been left to the courts. After wrestling with it for some fifty years, courts have accomplished little other than to decide on the particular facts of the case whether the movement was that of a train within the meaning of the Act. It is apparent, therefore, that a holding in one case carries

little weight as a rule for decision in another. Even when the facts of the case are disclosed, the question must depend largely upon the opinion or judgment of the court called upon to make the decision. And where the facts bring the case within the twilight zone, as we think they do in the cases before us, the opinion of one judge or court is likely to be as good as that of another."

I am also in accord with the opinion there expressed that there are decided cases which afford support for both of [fols. 13-20] the contentions here made. In this situation each case is controlled by the facts presented.

Considering all the facts, including the number and nature of the grade crossings referred to and the physical aspect of the yard and the operations, I have reached the conclusion stated.

It is suggested that counsel for the respective parties submit proposed findings of fact and conclusions of law in accordance with the views here expressed.

Very truly yours, Sterling Hutcheson, United States District Judge.

[fol. 21] [Fil endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA AT RICHMOND

Civil Action No. 2364

UNITED STATES OF AMERICA, Plaintiff,

v.

SEABOARD AIR LINE RAILROAD COMPANY, Defendant

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed June 28, 1957

The above entitled cause having come on regularly for trial on January 31, 1957, and the Court having duly considered the evidence and the post-trial briefs, now makes the following

Findings of Fact

1. The defendant, Seaboard Air Line Railroad Company, is a common carrier by railroad engaged in interstate commerce within the jurisdiction of this Court and subject to the provisions of the Acts of Congress known as the Safety Appliance Acts (U. S. Code, Title 45, Sections 1 to 16, inclusive), and the order of the Interstate Commerce Commission of June 6, 1910, requiring that whenever any train is operated with power or train brakes

> "Not less than 85 per cent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train and all power-braked cars in every such train which are associated together with the 85 per cent shall have their brakes so used and operated."

2. The main line of the defendant runs from Richmond, Virginia, to points in the State of North Carolina, and other [fol. 22] States, from which main line it operates a branch for freight service only from a point in Chesterfield County, Virginia, known as Bellwood, to the City of Hopewell, Virginia.

3. In said City of Hopewell the defendant has established yard limits for the movement of its locomotives, cars and trains, within which yard limits all of the movements complained of and hereinafter described took place. Included within said yard limits are a large number of tracks which taken as a whole are known as its classification or assembly yard to or from which all trains moving beyond the city limits of Hopewell come or go. In said classification yard trains arriving at Hopewell are broken up and the cars composing the same are separated and reassembled according to their consignees and the location of the place at which loaded cars are to be unloaded or empty cars are to be spotted for loading or interchange made with the Norfolk and Western Railroad (N. & W.).

4. Between the classification yard of the defendant and the lead tracks of the Allied Chemical and Dye Company (Allied Chemical) and Continental Can Company (Can Co.), a distance of approximately two miles, all within the Hopewell yard limits of the defendant, there are the fol-

lowing street and railroad crossings in order, commencing at the classification yard: Hopewell Street, Palm Street, N. & W. track, private road, two N. & W. tracks, private road, Randolph Street (Virginia State Route 10), Terminal Street, DuPont (or Hopewell) Street, N. & W. track. The tracks of the N. & W. parallel those of the defendant from the Allied Chemical and Can Co. plants to Palm Street. The only crossings of streets or railroads where the N. & W. does not parallel those of the defendant are those at Hopewell and Palm Streets. Between the two N. & W. tracks and the private road before reaching Randolph Street there is an [fol. 23] interchange track for the interchange of cars between the N. & W. and the defendant. In conducting movements along this track, which is 7 to 8 feet distant from the track of the defendant, the N. & W. does not connect the hoses between the engines and cars. There are nine industrial sidings or spur tracks of the Seaboard branching off the various points from its rails between the classification yard and Allied Chemical and Can Co. Locomotives of the Allied Chemical, the N. & W., and the defendant use the lead track at the Allied plant. Allied Chemical plant locomotives also use a portion of defendant's track a short distance beyond the confines of said plant.

5. The N. & W. tracks crossed at grade are used by that railroad to serve industries only. Fixed signs known as "Stop Boards" are located on the N. & W. tracks and movements thereon are required to come to a stop before crossing the tracks of the defendant. Movements on the tracks of the defendant across those of the N. & W. have the right-of-way.

6. Each street crossing is provided with all warning devices required by law for the protection of travelers on the highway. Randolph Street crossing is protected by manually operated crossing gates operated by a watchman.

7. Traffic over the private crossings is generally light. Traffic over the street crossings varies from moderate to heavy depending on the time of day, the heavy traffic occurring at hours which do not coincide with the usual hour for movements along the tracks here involved, but there are no scheduled movements over these tracks.

8. The Hopewell Fire Department maintains four pieces of fire-fighting equipment and an emergency rescue vehicle at its engine house on Terminal Street within a few hundred

feet of the tracks here involved. There is no evidence that the movements complained of or similar movements have at any time or in any way interfered therewith.

[fol. 24] 9. All movements within the defendant's yard limits at Hopewell, Virginia, are made under the direction of its agent there.

10. On March 5 and 6, 1956, on complaints made by the Brotherhood of Railway Trainmen, two inspectors from the Interstate Commerce Commission observed four movements of cars within the yard limits of Hopewell to or from defendant's classification yard to or from the Allied Chemical and Can Co. plants. Failure to use air brakes on these four movements, which were entirely within the yard limits, is the basis for this action.

11. The first movement observed by the inspectors originated at the Allied Chemical plant on March 5, 1956, at 12:09 p.m. It consisted of 26 cars and traveled to defendant's classification yard, a distance of approximately 11,000 feet, the maximum distance traveled in these movements. Running speed was approximately 10 miles per hour.

12. The second movement originated at defendant's classification yard on March 5, 1956, at 12:37 p.m. It consisted of 28 cars, thirteen ahead of the engine and fifteen behind. It traveled to the Can Co. plants.

13. The third movement originated at the Allied Chemical plant at 3:26 p.m. on March 5, 1956. It proceeded with 29 cars to an interchange with the N. & W., approximately half way between the Allied Chemical plant and defendant's classification yard. At the interchange, the switch engine disconnected the cars from the Allied Chemical plant, coupled on 20 cars at the interchange, and then again coupled on the 28 just uncoupled. It then proceeded to the classification yard.

14. The fourth movement originated at defendant's classification yard at 11:57 a.m. on March 6, 1957. It consisted [fol. 25] of 23 cars, eight ahead of the engine and 15 behind. It proceeded to the Allied Chemical and Can Co. plants.

15. There is no perceptible grade on any of the tracks involved in the four movements plaintiff complains of.

16. The speed limit in the Hopewell yard which embraces all the tracks involved in this action, is fixed by the rules of the defendant at yard speed; that is, the movement must

not be made at such a speed that it cannot be stopped within half the range of vision along the tracks regardless of whether air brakes are used or not.

17. In the 27 years since the line into Hopewell was established, there have been four crossing accidents; two in 1941, one in 1944, and one in 1954. There has never been an injury to an employee on a movement between the classification yard and the industrial plants, spurs and sidings or interchange with the N. & W. in Hopewell.

18. For the defendant to connect the air hoses on movements between its classification yard and Allied Chemical and Can Co. and intermediate spur tracks, sidings and interchange, would result in a delay of approximately forty minutes in each movement and entail an additional annual expense of $30,000 for wages alone, and other expenses.

19. The movements complained of would not have been less hazardous to employees or the public if air brakes had been coupled and used.

20. The movements complained of were shifting movements and not train movements.

Conclusions of Law

1. No absolute standard is available for determining whether a particular movement is a train movement, so that [fol. 26] under applicable Interstate Commerce Commission regulations 85% of the cars must have air brakes capable of being operated by the engineer of the locomotive, or whether it is a shifting movement, in which case it is not necessary that air brakes be functioning on the cars. Instead, each case must be decided on its merits, giving full consideration to the purpose behind the statute and its implementing regulations and all pertinent facts.

2. The evidence shows that the movements in question were shifting movements and not train movements and that there has been no violation of the provisions of U. S. Code, Title 45, Sections 1 to 16, inclusive, as modified by the order of the Interstate Commerce Commission of June 6, 1910.

3. The action will be dismissed with costs to the defendant.

Sterling Hutcheson, U. S. District Judge, June 28, 1957.

[fol. 27] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

LETTER—Filed June 28, 1957

June 28, 1957.

Edwin J. Slipek, Esquire,
Assistant United States Attorney,
Post Office Building,
Richmond, Virginia.
Eppa Hunton, IV, Esquire,
Electric Building,
Richmond, Virginia.

GENTLEMEN:

Re: The United States of America v. Seaboard Air Line Railroad Company, Richmond Civil Action No. 2364

I have examined the proposed findings of fact and conclusions of law submitted by counsel in the above case. It is my conclusion that the findings and conclusions submitted by the defendant correctly set forth the situation, with the following amendments:

1. On page 2, paragraph numbered 4, line 8, following the words "Randolph Street", I have inserted "(Virginia State Route 10)".

2. On page 3, at the conclusion of paragraph numbered 4, I have inserted the following language: "Locomotives of [fol. 28] the Allied Chemical, the N. & W., and the defendant use the lead track at the Allied plant. Allied Chemical plant locomotives also use a portion of defendant's track a short distance beyond the confines of said plant." It will be noted that this language is substantially the same as suggested by counsel for the plaintiff and would appear to be supported by testimony of the witness Roy E. Kean on page 76 of the transcript.

The findings of fact and conclusions of law suggested by defendant, amended as stated, have been filed today.

If counsel are of opinion that any further order is required, I shall be glad to have proposed draft.

Very truly yours, Sterling Hutcheson, United States District Judge.

[fols. 29-35] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Civil No. 2364

THE UNITED STATES OF AMERICA, Plaintiff,

v.

SEABOARD AIR LINE RAILROAD COMPANY, Defendant

JUDGMENT—July 3, 1957

This action came on to be tried before the Court, and the evidence adduced by the parties having been heard, and the action having been argued by counsel, and the Court having maturely considered the same and having made its findings of fact and conclusions of law, it is hereby

Adjudged, that this action be, and it hereby is, dismissed on the merits and judgment is accordingly entered for the defendant, Seaboard Air Line Railroad Company.

July 3, 1957

Enter: Sterling Hutcheson, United States District Judge.

I ask for this: Eppa Hunton, IV, Counsel for Seaboard Air Line Railroad Company, defendant. Seen objected to: Edwin J. Slipek, Assistant United States Attorney.

[fol. 1] IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION

[Title omitted]

Transcript of Testimony—January 31, 1957

Before Honorable Sterling Hutcheson, United States District Judge.

APPEARANCES:

Edwin J. Slipek, Esq., Assistant United States Attorney, and Henry L. Hilzinger, Esq., Attorney for the Interstate Commerce Commission, For the Plaintiff.

Messrs. Hunton, Williams, Gay, Moore & Powell, by Eppa Hunton, IV, Esq., For the Defendant.

[fol. 2] STIPULATIONS OF COUNSEL

Mr. Slipek: To expedite the case, counsel for the Government and counsel for defendant have agreed on certain stipulations, which Mr. Hunton will present to the Court.

Mr. Hunton: If Your Honor please, it has been stipulated and agreed between counsel in this matter that the plat which I have here of the City of Hopewell, entitled "Map of Hopewell, Virginia, Office of City Engineer—Scale One Foot Equals 600 Feet—January 1, 1955," may be introduced and considered in evidence as Government's Exhibit 1 as if fully proven; that the plat entitled "Map Showing Curve and Alignment of Prince George & Chesterfield Railway, Bellwood, Virginia, to Hopewell, Virginia—Scale One Inch Equals 1,000 Feet—February 18, 1925, Revised June 25, Office of Chief Construction Engineer, Norfolk, Virginia"; and a third one entitled, "Layout Hopewell, Virginia—Scale One Inch Equals 20 Feet—Part of Chief Engineer's Drawing No. 12031," may be considered as Defendant's Exhibits 1 and 2 respectively.

It is stipulated and agreed between counsel that the movements in question were made without the 85 percent of air brakes connected and operating, as alleged, as well as the [fol. 3] other admissions contained in the answer filed.

CHARLES R. MEYRICK, called as a witness by and on behalf of the plaintiff; and being first duly sworn, testified as follows:

Direct examination.

By Mr. Slipek:

Q. Mr. Meyrick, kindly state your name, residence, and occupation, please, sir.

A. Charles R. Meyrick, Robert Bruce Drive, Bon Air, Virginia; I am an inspector for the Interstate Commerce Commission.

Q. How long have you been so employed, sir?

A. Approximately two and a half years.

Q. What was your occupation prior to becoming an inspector?

A. I was a brakeman and conductor for the Boston & Albany Railroad.

Q. How long were you so employed?

A. Twelve years and two months.

Q. Will you please outline to the Court your duties as a safety inspector?

A. As a safety appliance inspector, I am expected to inspect the installation and maintenance of various types [fol. 4] of safety appliances on railroad locomotives and carriers; to investigate complaints which may have been initiated by the traveling public and employees upon railroads as to unsafe practices, defective safety appliances or things used on train tracks; to investigate accidents in which there is serious or extensive damage to property or loss of life.

Q. What is your area of operations?

A. It comprises nearly the entire State of Virginia, nearly the entire State of West Virginia, the State of Delaware, the District of Columbia, and approximately half of the State of Maryland.

Q. Directing your attention to the dates on or about March 5 and 6, 1956, did you have occasion to conduct an investigation in the Hopewell area and, specifically, did you have occasion to investigate the Seaboard Air Line Railway?

A. Yes, sir, I did.

Q. Will you, then, sir, give the Court in your own words the results and findings of your investigation on those dates?

The Witness: May I refer to notes?

The Court: Yes, sir.

A. On the 5th of March, 1956, I was in the vicinity of Allied Chemical & Dye Company's plant at Hopewell and observed Seaboard Air Line Engine 1745 depart from that [fol. 5] point at 12:09 p. m., with twenty-six cars. I also observed that the air hose between the engine and the first car was not coupled; consequently, the brakes on none of the cars could be operated.

Q. Will you speak so the Court can hear you.

A. I'm sorry. I observed this Seaboard Air Line Engine 1745 depart from this point with twenty-six cars and the air brakes operative on none of these cars. That departed at 12:09 p. m., and arrived at the Seaboard's Hopewell yard at 1:22 p. m.

Q. Did you accompany that movement?

A. Yes, I did.

Q. What was your position on the train during such movement?

A. I rode one of the cars of the movement.

Q. Approximately where was that car located in the train?

A. It would be difficult to state accurately at the present time.

Q. Well, toward the front, rear, or middle?

A. I would say it would be nearer the front of the cut of cars.

Q. What kind of car were you riding?

A. I believe it was a tank car.

Q. In the run from the Allied Chemical Plant to the Hope- [fol. 6] well yard, were there any switching operations conducted by that locomotive in connection with this train?

A. There were none.

Q. It was a direct run?

A. It was a direct movement from Allied Chemical & Dye plant to the Hopewell yard.

Q. What is the approximate distance from the Allied Chemical & Dye plant to the Hopewell yard?

A. Approximately 11,000 feet.

Q. That would be——

A. Well, roughly, a little over two miles.

Q. I notice that you have the time of departure from the Allied Chemical plant and you also have the time of arrival at the Hopewell yard and you have the distance between the points. At what speed was this train traveling?

A. It would be approximately ten miles an hour.

Q. And that is from your own notes of the investigation?

A. Yes, it is.

Mr. Slipek: May I ask a question of counsel?

(Mr. Slipek spoke with Mr. Hunton.)

Q. Mr. Meyrick, I hand you Defendant's Exhibit No. 2, sir. Display the map so the Court can see it. If you will, take the blue pencil that I have handed you and start with [fol. 7]. that particular run that you referred to, on March 5, and indicate in blue the intersections that this run traversed (and I mean street intersections) and, at the same time, call the Court's attention to any railroad crossings, that is, beginning with the Allied Chemical plant and working your way to the Hopewell yard.

A. To begin with, there is a crossing at grade with the Norfolk & Western Railway at this point, here. It is outlined in green pencil. You want me to mark it in blue, you say?

Q. Yes.

A. Then, immediately after that there is a highway crossing at grade, which is Dupont Street, and that is approximately at that point (indicating).

Q. Is it called Dupont Street on that map?

A. The map indicates that it is Hopewell Street, but the street signs indicate that it is Dupont Street.

Q. Very well. Now, pausing right there, what is the nature of that street crossing?

A. It is a public highway crossing at grade and it provides access—is one of the means of access to these industrial plants, Allied Chemical & Dye and Continental Can Company.

Q. Is it used by these plants in hauling material and supplies to these plants and away from these plants?

[fol. 8] A. Yes, it is.

Q. Do you have any idea what number of people are employed in these plants that it serves?

A. I am sorry, I do not.

Q. Will you say it is a small number, or substantial?

A. I would say it would be a very substantial number.

Q. But you can't——

A. I'm sorry, I wouldn't care to estimate.

Q. Now, sir, carry on to the next crossing, if you will.

A. I find on the map a green line and, according to my notes, there is nothing at this point and, consequently, I don't know what this green line would indicate.

Q. Well, go on with your notes, then, and disregard that for the moment.

A. The next crossing, according to my notes, is Terminal Street, which is approximately here, another street crossing at grade, at approximately this point.

Q. Will you mark it clearly in blue, sir?

(The witness made the designation on the map.)

Q. Now, what type of crossing is that?

A. A street crossing at grade.

Q. Where does it go to? Where does it lead to on either [fol. 9] side?

A. On the righthand side in the direction of movement it would lead into Hopewell Street. At the intersection of Terminal and Hopewell Streets is the headquarters and main fire station of the Hopewell Fire Department.

Q. How many pieces of equipment are maintained at that Fire Department?

A. The Fire Department has four pieces of equipment but the building also houses the emergency equipment of the Hopewell Emergency Squad.

Q. Do they have occasion to use that crossing?

A. Yes, they do.

Q. Your investigation revealed that they do?

A. Yes, they do.

Q. You say they have four pieces of equipment plus——

A. Emergency vehicles for the Hopewell Emergency Squad.

Q. Do you have any idea of the frequency of their runs across that crossing?

A. That would vary with conditions, and it would be hard to give any hard and fast figure on that.

Q. Carry on, sir, to the next crossing.

A. That was Terminal Street, and the next crossing is Randolph Street, or Virginia State Route 10, which is also a public road crossing at grade, and it is at this point [fol. 10] (indicating).

Q. Will you tell the Court what type of safety devices are at that junction?

A. That particular crossing is protected by manually operated crossing gates, operated by an operator in the tower in one of the angles of the intersection.

Q. And that is a widely traveled highway, is it not?

A. Very heavily traveled.

Q. All right. You, of course, have been approaching this last intersection of Randolph Street on Route 10 from the Allied plant, have you not?

A. Yes; that is true.

Q. What situation obtains if you are moving from the Hopewell yard to the Allied plant in reference to that intersection?

A. There is a very sharp curve which materially restricts visibility in the immediate vicinity of the crossing approaching from either direction.

Q. Then, the same situation would obtain——

A. It would apply in either direction.

Q. Very well, sir. Now, if you will, go on to the next crossing.

A. There is a private road crossing at about this point (indicating). It is not indicated on the map. It provides access to a yard in which materials which have been [fol. 11] cleaned—materials which have been removed from cars cleaned out preparatory to loading by the Norfolk & Western Railway, are stored; in other words, waste material.

Q. What evidence was there that these operations were being carried on?

A. Oh, there was a large quantity of these waste materials piled along the track.

Q. Will you explain to the Court how that operation works?

A. As cars are emptied and returned to the railroad, they are placed on a particular track in the yard and there is a force whose duty it is to clean out these cars for future

loading, and the waste material removed from these cars is piled beside the track and removed from that point.

Q. And your investigation indicated that particular area was used for removing the debris and dunnage from that pile?

A. Yes.

Q. All right. Continue, will you.

By the Court:

Q. That is removed by whom? By the railroad, or truck?

A. Frankly, I don't know who would remove it, whether it is done on a contract basis, or whether the railroad removes it, itself, but I imagine it would be removed by motor [fol. 12] vehicles, rather than by railroad equipment.

We next have a crossing at grade with the Norfolk & Western Railroad at this point, and as we progress from the yard we come to the interchange track between the Norfolk & Western Railway and the Seaboard Air Line Railroad, which is at this point.

By Mr. Slipek:

Q. Now, going back to the point before the one you are on now, where is that point? So the record will show where you are in there. You say "at this point."

A. The interchange track—is that what you are referring to? Or the crossing of the Norfolk & Western Railway?

Q. I am asking you to pinpoint the crossing with a little more certainty.

A. All right. This last crossing of the Norfolk & Western is at this point (indicating), and as we proceed toward the yard——

Mr. Hunton: May I interrupt just to clarify the situation?

By Mr. Hunton.

Q. The Norfolk & Western crossing is not a railroad crossing, but the crossing of the railroad?

A. No, sir; the crossing I referred to was a crossing at grade with the Norfolk & Western Railway.

As we leave that point we proceed toward Hopewell yard [fol. 13] and the next point is the Norfolk & Western Railway and Seaboard Air Line Railroad interchange track.

which is located at this point (indicating). Leaving the Norfolk & Western Railway interchange track, here again I find a green line which would indicate some sort of crossing but which does not show up in my notes.

By Mr. Slipek:

Q. All right. Continue.

A. As we leave the Norfolk & Western Railway interchange track we come to another crossing with the Norfolk & Western Railway at grade at this point (indicating). This next crossing is a private road crossing also at grade.

Q. And where does that private crossing lead to?

A. It leads to what is indicated on the map as the Tubize Artificial Silk Company.

Leaving that crossing, next we come to another railroad crossing at grade with the Norfolk & Western Railway at this point (indicating). Immediately after we cross the Norfolk & Western Railway at grade, we come to a public street crossing at grade. This is Palm Street crossing and it is located approximately here (indicating).

Proceeding on from Palm Street we come to Hopewell Street, which is another public road crossing at grade and is located at this point (indicating).

Q. Where does that last street lead to?

[fol. 14] A. It leads to Hercules Powder Company.

Q. Is that a big establishment, or a small operation?

A. It is a relatively large plant.

Q. Do the employees use that crossing in going to and coming from work?

A. Yes, they do.

Q. You have no idea how many people are employed there?

A. I heard the figure five hundred used as an estimate.

Mr. Hunton: If Your Honor please, I object on the ground that it is hearsay.

The Court: Yes.

By Mr. Slipek:

Q. Don't go into what someone told you. That will conclude that portion.

I now hand you a copy of Government's Exhibit 1. Where does this entire movement take place?

A. That is the course of the first movement as outlined, from this point, approximately this point, following the line of the Seaboard Railroad, which is indicated in red, across the various crossings and into the Hopewell yard, which is at this point.

Q. And where is the whole movement? Orient that movement in connection with the town of Hopewell, sir.

[fol. 15] A. Entirely within the city limits.

Q. Can you indicate in blue the position of the fire house that you referred to on the other map?

A. Surely, if I can find Terminal Street. It should be approximately there: it is marked on the map at this point.

Mr. Hunton: If Your Honor please, it is stipulated and agreed between counsel for the parties that there is no necessity for the witness to repeat his testimony with respect to the various crossings and things as to each one of the counts here involved, but that testimony may be taken as going to all four counts here in question.

The Court: Very well. The movements were over the same general trackage?

Mr. Hunton: That is right, sir.

I take it that goes not only for your witnesses, but mine as well.

Mr. Slipek: Yes, indeed, but I won't bar you from including a few more crossings.

By Mr. Slipek:

Q. Now, direct your attention to the next investigation you made on that day.

A. That consisted of a movement from Hopewell yard to the plants of Allied Chemical & Dye and Continental Can Company.

[fol. 16] Q. This was in the opposite direction?

A. It was.

Q. This is from the Hopewell yard to the Allied Chemical plant.

A. That consisted of Engine 1245 with twenty-eight cars, thirteen of which were ahead of the engine and fifteen behind the engine. The movement departed from Hopewell

yard at 12:37 and arrived at the plant of Continental Can Company at 12:52.

Q. Did you ride this particular movement?

A. Yes, I rode this movement.

Q. And where were you riding?

A. I can't recall specifically whether I was on the engine or on one of the cars in the train.

Q. From your notes, how fast was that train traveling?

A. Approximately fifteen minutes elapsed from the time he left Hopewell yard until he arrived at the Continental Can Company's plant, which would indicate between ten and thirteen miles an hour.

Q. Was this a direct run?

A. This was a direct run with no stops en route.

Q. With no switching operations?

A. No switching operations whatsoever.

Q. And it made the same crossings as you stated before?

[fol. 17] A. Yes, it did.

Q. How many employees were there on that train? Do you know?

A. It consisted of either five or six men. I don't recall whether they used three brakemen on that run or not, but it did consist of a fireman, an engineer, and two brakemen, and possibly three brakemen.

Q. Would that hold true for each of these movements?

A. That would hold true for each of these movements.

Q. Do you know where these brakemen were, sir?

A. There again I am going to have to trust to memory. I would say that they were probably in position on cars of the train.

In this particular movement we are pushing thirteen cars ahead of the train. There was a man on the leading car and I can't recall if there was a man between him and the engine or not.

Q. Do your notes indicate anything in connection with the number of cars traversing these respective intersections at the time of this run?

A. Do you mean vehicular traffic on the public street crossings?

Q. Vehicular or pedestrian.

A. I am sorry, I have nothing in my notes that pertains to the volume of traffic over any of these crossings. I do

[fol. 18] know that in the vicinity of the industrial plants traffic at certains —— of day would be heavy.

Mr. Hunton: If Your Honor please, I object to the evidence of what traffic there might be in the vicinity of particular plants. It is what traffic was there at this particular time.

The Court: I think the point is well taken. The objection is sustained.

By Mr. Slipek:

Q. Continue, sir.

A. The next instance was one in which Engine 1758 departed from Track 38 at the Allied Chemical & Dye Company plant with twenty-nine cars and traversed the usual route up to the point of the Norfolk & Western interchange, at which——

Q. What date was that?

A. That was March 5.

Q. All right, continue.

A. At this particular interchange track between the two railroads twenty additional cars were picked up and added to the train.

Q. Point that out to the Court, please, on Defendant's Exhibit No. 2.

A. This is the location of the interchange track and the point at which the additional cars were added to the train [fol. 19] (indicating to the Court on the exhibit).

Q. Then what happened to the train?

A. The train proceeded as usual over the normal route to Hopewell yard. Incidentally, this movement departed from Allied Chemical & Dye Company plant at 3:26 p. m., and arrived at Hopewell yard at 3:52 p. m., the difference in elapsed time being due to the stop to pick up the twenty cars.

Q. And no operation took place on that particular movement other than stopping and coupling on additional cars?

A. That was the only movement; there were no other movements involved.

Q. No cars were cut out of the train?

A. No.

Q. Or rearranged in any way?

A. None whatsoever.

Q. What was the distance from the starting point to the interchange? In other words, you started out at Allied Chemical and you went to the interchange?

A. It is approximately midway between the Allied Chemical & Dye Company plant and Hopewell yard, perhaps not quite midway. I would say it would be closer to Hopewell yard than to the Allied Chemical & Dye Company plant. I can't find in my notes the exact distance between the interchange track and Hopewell yard.

[fol. 20] Q. But you say it is approximately halfway?

A. Yes, I would.

Q. Including the stopping for the picking up of this additional string of cars, what was the average speed of that movement?

A. The notes indicate that five minutes elapsed at the interchange track at which these twenty cars were picked up, so if we subtract five minutes from twenty-six minutes, the total time elapsed between Allied Chemical & Dye and Hopewell yard is twenty-one minutes, and slightly over ten miles. That would be approximately—forgive me while I make these computations.

Q. Take your time, now.

A. That should come out to an average speed of six miles an hour.

Q. Explain in greater detail exactly what occurred at that interchange track.

A. As we arrived at the interchange track the movement stopped at the clearance point of switch which led to the interchange track. At this point the engine was detached from the cars it had brought from Allied Chemical & Dye. It moved over the switch to the interchange, then onto the track, coupled to the cars on that track, pulled them over the track and pulled them over the switch to the cars and as soon as they had coupled on it departed for Hopewell yard.

[fol. 21] Q. Making no stops en route?

A. No stops en route.

Q. All right, sir. Continue on with the next movement, please, sir.

A. I have a movement which took place on the 6th of March. This movement was from Hopewell yard to the plants of Allied Chemical & Dye and Continental Can Com

pany. It consisted of Engine 1758 with eight cars ahead of the engine and fifteen cars behind the engine, for a total of twenty-three cars. This movement departed from Hopewell yard at 11:57 a. m., and arrived at the industrial plants, Continental Can and Allied Chemical & Dye, at 12:15 p. m. with no stops en route. Total elapsed time of eighteen minutes.

Q. That would make an average speed of what?

A. I would say that would put the average between five and seven miles an hour.

Q. And you rode this particular movement yourself?

A. Yes, I did.

Q. Now, these locomotives you are referring to throughout this whole thing were all Seaboard Air Line locomotives, were they not?

A. They were.

* * * * * * *

[fol. 22] Cross-examination.

By Mr. Hunton:

Q. Mr. Meyrick, you have described in your direct testimony certain crossings of streets and of the Norfolk & Western Railroad tracks. Are there any spurs leading off of this track into industrial tracks along the way, and if so, would you be good enough to start at the Continental Can end there on Dupont Street and number the tracks as they lead off into the industrial plants?

A. May I take the map again?

Q. Certainly. Which one would you like?

A. The one on which we originally marked.

(The exhibit was handed to the witness.)

A. (Continuing) I have no notes of industrial tracks; consequently, I am reconstructing this from memory. At this point the Seaboard Air Line freight house, and immediately beyond this there is a track—that serves this—and immediately beyond this there is a warehouse, I believe, at which I noticed a number of cars yesterday. That would be No. 2. I thought that would more likely be between Terminal Street and Randolph Street, rather than where I located it. Then, moving toward Hopewell yard there is a grade crossing with the Norfolk & Western Railway at this point.

However, this track is also accessible from the Seaboard Air [fol. 23] Line track. I noticed there at that point yesterday there were several tank cars at some sort of industry. I would not say it was an industrial plant, but it is some sort of a delivery track. This main line here, which I do not have in my notes, I can't comment upon. As the map indicates, this point at which the Norfolk & Western Railway crosses the Seaboard Air Line at grade, the track is also accessible from the Seaboard track and the map indicates that this particular track leads to Tubize Artificial Silk Company. I have no reason to suspect that the map is not correct. I have not gone into that in any great detail.

Q. There is likewise a Seaboard track going in there, isn't there?

A. Yes. That track would be used interchangeably by either of the two railroads.

Q. It does belong to the track that you are talking about?

A. I am sorry, I am not in position to establish ownership of that track.

Q. Well, which tracks are you in position to show the ownership of, as shown on the map?

A. Actually, if I were to have to introduce evidence to indicate ownership of any of the tracks, I could not do it.

Q. Then, you are just guessing as to which are Seaboard tracks and which are Norfolk & Western?

[fol. 24] A. I am going on the basis of certain fixed signals there which are used exclusively by the Norfolk & Western at grade crossing, to establish ownership.

Q. Didn't you indicate this track going into the Tubize Artificial Silk Company?

A. Well, these Norfolk & Western Railroad fixed signals are what is called a stop board, which means that before Norfolk & Western engines come to that crossing, they must stop before proceeding.

. . . . . .

[fol. 25] Q. Would you identify that point that you are referring to in some way?

A. Approximately here (indicating).

Q. For the record, mark that with an X, if you will, please.

(The witness made the indication on the exhibit.)

A. I don't know where that track leads, but it does parallel the Norfolk & Western Railroad track leading to the Hercules Powder Company.

A. Then, from that point we proceed to that point at which the Norfolk & Western Railway crosses the Seaboard Air Line at grade, and there is another switch and a track which parallels this Norfolk & Western Railway track, which leads in this direction, which would apparently lead to Hopewell China Company, from this map.

Q. Mark that with Y, will you, please?

A. After we cross Palm Street we come to a wye switch [fol. 26] which leads to the Hopewell Subdivision main track.

Q. Now, all of those are industrial spurs, are they, that you have testified to?

A. I wouldn't say that this is an industrial spur; I don't know where it leads; it is a spur track. Nor can I state that this is an industrial spur. I would state——

Q. What I asked you was if you would start at the Continental Can Company and point out and enumerate the industrial spurs branching off from the Seaboard between that point and the classification yard, up here.

A. From positive knowledge, all I can state is that there are three tracks which might be considered industrial tracks.

Q. Which are those?

A. The one which serves the freight house, the one which serves the warehouse and packing plant located between Terminal Street and Randolph Street, and one at this point at which I noticed several tank cars yesterday.

Q. Do you know whether all of the tracks shown on that map are within the yard limits of the Seaboard at Hopewell? [fol. 27] A. It is my understanding that they are.

Q. What passenger service is there on the tracks in question, Mr. Meyrick?

A. None.

Q. On the tracks in question, did you make any inquiry as to where the trains, if they are trains, came from and went to?

A. Would you clarify that just a little bit, please?

Q. I say, on the tracks complained of in the complaint in this case and the movements complained of on the tracks over which those movements went, where did the trains come from and go to? What was their point of origin and point of destination?

A. The points of origin and destination would depend on the direction of movement. The movements to the plants originated at Hopewell yard with delivery to Allied Chemical & Dye and Continental Can.

Q. What do you refer to as Hopewell yard?

A. This point, the classification yard.

Q. So that all of the movements were within the yard limits, were they not, of Hopewell?

A. Yes, they were.

Q. Now, let me ask you this question, Mr. Meyrick: Starting at Continental Can Company, how far are the tracks of the Seaboard paralleled by the tracks of the Norfolk & [fol. 28] Western Railway?

A. You want me to indicate a point on the map?

Q. Yes, sir, starting at the Continental Can Company.

A. Well, let us assume that this is Continental Can. It is not very well defined at this point. The Norfolk & Western Railway parallels it from here.

Q. Put an A there at the beginning, if you will, please.

A. (Marking the exhibit) From this point along Dupont Street and around this curve——

Q. It passes the Seaboard Freight Station, does it not?

A. It does. Then across Terminal Street, across Randolph Street; the Norfolk & Western classification yard is approximately at this point and the tracks are roughly parallel to one another and at this interchange track they are still parallel, and the Norfolk & Western Railway has a track which I understand serves the Hercules Powder Company and would parallel the Seaboard track to this point.

Q. Which is just north of Palm Street, I believe, is it not?

A. Yes.

Q. Mark that B, will you, please?

A. All right (marking on the exhibit).

Q. When you were there on March 5 and 6—I believe [fol. 29] were the dates—did you observe any movements on the Norfolk and Western track parallel to the Seaboard track?

A. I believe there were movements, but I didn't pay any particular attention to these movements. At some point between where the Norfolk & Western begins to parallel the Seaboard and where it stops, I am positive there were movements on those dates which I must have observed but to which I paid no attention.

Q. Did you notice whether the air brakes were connected on the Norfolk & Western trains?

[fol. 30] A. I did not notice.

By Mr. Hunton:

Q. You were there for the purpose of observing whether or not air brakes were connected on trains operating in [fol. 31] this vicinity, were you not?

A. Only Seaboard Air Line trains.

Q. Why did you only look at the Seaboard's? Are you assigned solely to inspection of Seaboard Air Line trains?

Q. Why did you examine only the Seaboard Air Line train?

A. I was investigating a specific complaint alleging non-use of train brakes on transfer movements on the Seaboard Air Line Railway in Hopewell, Virginia.

Q. By whom was the complaint made?

A. The Brotherhood of Railway Trainmen.

Q. To whom?

A. It was made to our office in Washington.

Q. Isn't it your duty to make this inspection without respect to complaints?

A. Not when specifically instructed to investigate a par- [fol. 32] ticular complaint.

Q. What were your instructions with regard to this, then, Mr. Meyrick?

A. To investigate the complaint I have previously outlined and to render a report and if, in the opinion of Inspector Roy and myself, the provisions of the law have been violated, to submit evidence for prosecution of the carrier.

Q. Have you got a copy of the complaint?

A. I don't have one with me, no.

Q. Can you get a copy?

A. I can get you a copy of my instructions,

Q. Have you got a copy of your instructions?

A. I don't have those with me, no, but I can provide those.

Q. Were you instructed to investigate the operations generally, or were you instructed to investigate a specific movement?

A. I was instructed to investigate the transfer movements in question and to determine, in conjunction with Inspector Roy, whether the air brake provisions of the safety appliance law had been violated.

Q. It is a question of your judgment of whether they have been violated?

A. It is.

[fols. 33-37] Q. Have you any instructions from the Interstate Commerce Commission as to what constitutes a violation on which you are to form your conclusions?

A. Would you be a little more specific, please?

[fol. 38] By Mr. Hunton:

Q. Mr. Meyrick, are there any instructions to you from the Interstate Commerce Commission as to what is to determine whether a movement is a switching movement or a train movement?

A. As you have pointed out, it is very poorly defined, but it is our opinion that any movement of a substantial number of cars between two points with no stops en route to set out or pick up would be deemed a train movement.

By the Court:

Q. With no what?

A. No stops en route to either set out or pick up cars.

By Mr. Hunton:

Q. I repeat my question: You say that is your opinion?

A. That is one of the opinions.

Q. And the other opinion is that it may be merely a switching movement?

A. No, there isn't a doubt in my mind that it was a train movement.

Q. I say, there is a contrary opinion, isn't there?

[fol. 39] A. Yes—yours.

Q. That is right. Are there any rules or regulations or anything published by the Interstate Commerce Commission for your information?

A. No, sir.

Q. Or for the information of the railroads?

A. No. For that matter, it is my understanding that these cases are based upon past court decisions, and that is about all I have as a guide.

Q. All right, sir. What cases have you read? What cases are you relying on?

A. Not specifically on any case in particular. May I outline the procedure?

Q. Surely. That is what I am trying to find out.

A. We inspectors in the field are expected to investigate a situation, evaluate it to the best of our ability, and submit our findings to Washington, at which time these findings are subject to further review, and if in Washington they are satisfied that the evidence is conclusive enough, they will lodge the complaint for a prosecution of the carrier.

Q. Now, you said that whether these cases were brought was dependent upon court decisions, did you not?

A. Would you repeat the question?

Q. That previous court decisions determined the question [fols. 40-44] of whether these questions were brought.

A. That is a factor.

Q. Now, what are those court decisions? Do you know?

A. I'm sorry, I can't state specifically.

Q. Have you read any of them?

A. I have, yes.

Q. What ones are you relying on?

A. I'm sorry, I can't tell you.

Q. Have you any record of them?

A. I have notes at home.

Q. You haven't got anything with you here?

A. No, I haven't.

[fol. 45] Q. Mr. Meyrick, I hand you a copy of a letter dated Richmond, Virginia, March 9, 1956, to Mr. C. W. Taylor, Director of Safety and Service, Interstate Commerce Commission, Washington, D. C., and ask if that letter was written by you?

A. Yes, it was, in conjunction with Inspector Roy.

Q. I notice in reading this letter that you call attention to the fact that in some of these movements cars were pushed by the locomotive as well as being pulled by the locomotive?

A. That is right.

Q. Would it make any difference in your conclusions if they were not pushed, but all pulled?

A. I consider the pushing of cars more hazardous than the pulling of cars behind the engine.

Q. I say, would it make any difference in your conclusion that this was a train movement if it were all pulled instead of being part pushed and part pulled?

A. It would not.

Q. I notice, also, you say the distances involved in movements from Hopewell yard to the plants of the Hercules Powder Company and the Celanese Corporation are short, [fol. 46] well under a mile, and not of sufficient length to be deemed train movements; consequently, these movements are given no further consideration in this report. Those movements also cross the same streets, do they not, within the actual space, as the movements here complained of?

A. Hercules Powder Company? I understand the movements to Hercules Powder Company are handled exclusively by the Norfolk & Western.

Q. Then, why did you mention them in your report of Seaboard violations?

A. Because they were mentioned in my instructions.

Q. Then, your instructions did cover the Norfolk & Western?

A. No, sir. The movements to Hercules and Celanese were among those alleged to be train movements.

Q. By what line?

A. The Seaboard Air Line Railroad.

Q. And you found out they were Norfolk & Western?

A. The one to Hercules is handled exclusively by the Norfolk & Western and the one to Celanese is a Seaboard movement.

Q. As I understand it from reading your report, you disregarded the movements to Hercules and Celanese because they were under one mile in length?

A. They were short movements, yes.

[fols. 47-49] Q. At what distance, then, does a movement become a train movement and not a shifting movement?

A. There again, there is no hard and fast rule.

Q. There are shifting movements of two miles in length, are there not?

A. There could be.

[fol. 50] By Mr. Hunton:

Q. So that the same number of cars with the same arrangement of its air brakes, or lack of operation of its air brakes, moving over identically the same tracks and the same crossings, would be considered by you in one instance as a train movement and in another instance as a switching movement; is that correct?

A. You have not phrased that entirely as I would. We have not moved over the same number of crossings if we deliver only to the Norfolk & Western interchange.

Q. No. I am talking about between those two points, the Norfolk & Western interchange, and the so-called Hopewell yard—the same number of cars, the same locomotive, the same number of loads—in one instance with the brakes coupled and in another instance with the brakes uncoupled. In one case you say it was a train movement and in the other you say it was a switching movement, merely because [fol. 51] it would be a train movement if it went beyond that point.

By Mr. Slipek:

Q. Is that what you said—merely because it went beyond that point?

A. Not merely because it went beyond that point, but because the movement was so much longer.

By Mr. Hunton:

Q. Well, how far beyond that point does it have to go before it becomes a train movement?

A. I am not prepared to say.

Q. Does it have to go ten feet?

A. I am sorry, I could not say.

Q. All right. Let's start at this end. Suppose it stops when it reaches the track leading into the Allied Chemical, on the north of Dupont Street. Would it be a train movement then?

A. Would you trace the movement you have in mind, please?

Q. Yes, sir. The same movement that you talk about and say is not to be considered a train movement, except to go to the Allied Chemical plant.

Mr. Slipek: May it please the Court, what these hypothetical questions have to do to aid the Court, I simply don't know.

The Court: Mr. Slipek, is not the real question here to [fol. 52] be determined, so far as the factual issue is concerned, a matter of opinion?

Mr. Slipek: The Court's opinion?

The Court: Yes, sir.

Mr. Slipek: Yes, sir.

The Court: Well, the witness is an inspector, who has had two and a half years' experience in making inspections. I would like to know his answers to the questions. I would have to form my opinion somewhat upon the opinion of others, to a certain extent, and, never having conducted a switching operation myself, I have to be guided by the testimony here. The witness is somewhat of an expert. I think the examination is proper.

* * * * * * *

[fol. 53] By Mr. Hunton:

Q. Mr. Meyrick, in your letter of March 9 you say: "The distances involved in movements from Hopewell yard to plants of the Hercules Powder Company and the Celanese Corporation are short, well under one mile, and not of sufficient length to be deemed train movements. Consequently, these movements are given no further consideration in this report."

Now, I say, assume exactly the same movement and extend it a half a mile; does it become a train movement?

A. A mile and a half?

Q. A half a mile beyond what these are that you do not consider train movements on the tracks here in question.

A. I think, actually, now, you are asking for my opinion?

Q. That is all I can ask for, sir.

A. I think, actually, a movement from Hopewell yard to the Norfolk & Western interchange track, with no stops en [fols. 54-58] route to either set out or pick up cars, could be considered a train movement, but I think it might be difficult to prove, and, as has been already brought out, these are more or less individual decisions.

By the Court:

Q. Mr. Meyrick, let me ask you this question: From Hopewell yard to the interchange, I believe you say, you cross two railroad tracks and the intersections?

A. Three road crossings, and two railroad crossings at grade.

Q. Those railroad crossings—when I say "railroad crossings" I refer to the movement of the train in question—the highway crossings and the railroad crossings, three of one and two of the other; that is five. Are they any more or any less dangerous crossings or intersections than those between the interchange track and the Continental Can Company? Are they of a different type, I should have perhaps said.

A. Basically, they are the same. I would be hard put to differentiate between them. As far as highway traffic is concerned on the rail-highway crossing, that would vary according to conditions, which would also hold true on the railroad crossings at grade, and it would be very difficult to pinpoint it.

[fol. 59] Redirect examination.

By Mr. Slipek:

Q. Now, directing your attention to all four of these train movements simultaneously, was any of them a sorting operation?

A. None.

Q. Was any of them a selecting operation?

A. No.

Q. Was any of them a classifying operation?

A. No.

Q. On the last question you stated that if there was some movement in the classification yard, you would not consider it a train movement?

A. That is right.

Q. And it is there that the sorting, selecting, and classifying take place?

A. Yes.

Q. I think in general I understand you to say that if the train left the Hopewell classification yard and proceeded on to the Norfolk & Western interchange track, you, in your opinion, would consider that a train movement?

A. Yes, I would.

Q. And your superiors might not deem it a sufficient case [fol. 60] for prosecution; is that right?

A. That is right.

Q. And in your opinion and from your experience and knowledge of the type of operation, you would classify that as——

Mr. Hunton: If Your Honor please, I have not been objecting to the leading questions because of the absence of a jury, but I think counsel has gone too far and I do object to that question.

The Court: I think the questions are definitely leading, Mr. Slipek.

By Mr. Slipek:

Q. Did I understand you to say that if the train left the Hopewell yard and then proceeded non-stop—that is, a locomotive with a string of cars attached—to the Norfolk & Western, you would consider that a train movement?

A. Yes, I would.

Mr. Slipek: I will stop right there.

That is all. Thank you very much.

By the Court:

Q. Perhaps I misunderstood the quotation from the letter, or report. I thought in that report you expressed the opinion that it would not constitute a train movement.

A. May I be permitted to clarify that?

Q. Yes, sir.

[fol. 61] A. Inspector Roy and I concluded that due to the length of the movement, our office would not be interested in prosecuting it because it would be a hard case to prove, because it was a short movement. My own opinion was that movement of the cars from the classification yard to the Norfolk & Western interchange could be nothing but a train movement.

The Court: I see.

Recross-examination.

By Mr. Hunton:

Q. If I may read the paragraph in question again from the letter: "The distances involved in movements from Hopewell yard to plants of the Hercules Powder Company and the Celanese Corporation are short, well under one mile, and not of sufficient length to be deemed train movements. Consequently, these movements are given no further consideration in this report."

Do I understand you now to say that you do consider them train movements?

A. I did, under those circumstances, but I did not think my office would accept them and, consequently——

Q. Then, may I ask why you wrote this letter to the Bureau of Safety and said you did not consider them train movements?

[fol. 62] A. I said that due to the length of the trains I thought it would be a hard case to prosecute.

Q. Well, why didn't you say that, instead of saying they would not be deemed train movements?

A. I suppose, actually, it is just a question of phraseology.

Q. Take your letter there and read it over and let me know how much of it is just a question of phraseology and how much of it is not—how much of it you meant and how much of it you did not mean?

A. Do you wish to refer specifically to this first paragraph again?

Q. No, sir; I want to refer to the whole letter.

A. I would let it stand as it is.

Q. That is the only paragraph, then, that you repudiate?

A. I don't repudiate that.

Q. Well, what do you do with it?

A. My personal opinion is, if I were to make the decision, I would consider it a train movement.

Q. Why didn't you so report to your superiors in Washington?

A. The report is dated March 9 and I do not remember too many of the circumstances connected with it. I do feel that the motivating factor was that it would not be con- [fol. 63] sidered a good case because of the short movement.

Q. But you do feel that the other movement would be a good case because it would be twice the length?

A. Yes.

Q. And that is the only difference between the two, isn't it?

A. Yes.

Mr. Hunton: I have no further questions.

By the Court:

Q. Is there any difference in the grade between the Hopewell yard and Continental Can, or is it all pretty much the same grade—level?

A. There is no perceptible difference. There may be some difference in grade existing. That I have not gone into with the Engineering Department, but the difference in grade is not perceptible.

. . . . . .

[fol. 64] Redirect examination.

Q. What increase in hazard is incurred by the fact that the run is longer?

A. I do not really believe it is an increase in the actual hazard involved, but the fact that it is easier to prove it is a train movement. In other words, if it comes to a trial, I think the position is that it is easier to prove a long movement a train movement than a relatively short movement.

Q. Are you able to point to anything except the difference in the distances which should constitute a distinction be-

tween the two, or which you call a distinction between a short run and a long one, assuming that they have practically the same terrain and the same approximate intervals between crossings? What would be the distinction between the two?

A. Well, there is a greater number of crossings to be [fol. 65] traversed and, consequently, there is an increase in hazard, but to what extent, I would not be prepared to say. That, too, would vary with conditions at the time of the movement.

* * * * * * *

Chester E. Roy, called as a witness by and on behalf of the plaintiff, and being first duly sworn, testified as follows:

Direct Examination.

By Mr. Slipek:

Q. Mr. Roy, state your name, residence, and occupation, please.

A. Chester E. Roy, Inspector of Safety Appliances, Interstate Commerce Commission, Washington, D. C.

Q. Tell me, sir, how long have you been so employed?

A. Approximately six years.

Q. In that same capacity?

A. Yes.

Q. What was your occupation prior to your present service with the ICC?

A. I was employed in train service as a conductor and [fol. 66] brakeman on the Kentucky and Tennessee Railroad.

Q. Over what period of time?

A. From 1922 until 1951, near the middle of '51.

Q. Almost thirty years?

A. Approximately.

* * * * * * *

[fol. 67] Mr. Hunton: May it please the Court, this gentleman is also an inspector and made the inspection with the original witness, Mr. Meyrick. I am perfectly willing to stipulate that his testimony would be the same and that he would testify to the same facts, to save time.

[fol. 68] The Court: He has been in the courtroom and has heard the testimony of Mr. Meyrick.

That is correct, is it not, Mr. Roy?

The Witness: Yes, I heard the testimony.

By Mr. Slipek:

Q. Well, after hearing the testimony, if you were called upon to testify further in connection with these four particular offenses, would you say, sir, that your testimony would be in substantial accord with the testimony of Mr. Meyrick?

A. My testimony will substantiate his testimony in regard to these particular movements, but there are one or two other items that I would not substantiate; that is, all these various questions.

Mr. Slipek: Very well, sir.

May it please the Court, in view of the statement just made with regard to stipulating that his testimony would be the same, we can go ahead and have it so admitted, subject to the reservations that he has now made, and we could then go into the subject of the reservations.

The Court: Is that agreeable, Mr. Hunton?

Mr. Hunton: That is entirely agreeable.

The Court: Very well.

[fol. 69] By Mr. Slipek:

Q. Now, sir, you stated that your testimony would vary in some particulars from the testimony of Mr. Meyrick. One by one, will you enumerate or spell out the differences?

A. There is a slight variation in the computation of distances. May I refer to these notes?

The Court: Yes, sir.

A. (Continuing) Computing the distance from the entrance to Hopewell yard—that was the last switch just off of Hopewell Street—to this interchange track was roughly 2,087 feet. We arrived at that figure by walking it, tallying the rails, and multiplied by the standard rail length of 39 feet. My notes show that it is 77 rail lengths from the switch in Hopewell yard to the switch leading onto the interchange track. That is one point.

Q. Before we go on to the second point, will you, with this red pencil, indicate the position of the switch at the Hopewell classification yard?

A. Now, which switch do you mean?

Q. From where you started your computation.

A. We did not use any of these distances down in here. We started at this switch, at this point, here.

Q. Make a big X there. Label it "Switch," if you will.

A. (Marking on the map) We continued on down—Do [fol. 70] you have that marked "Interchange"?

Q. No. You trace it the best you can. Just take all the time you need.

A. There is Hopewell Street. I have a sketch here that I made from my notes, which is rough—very rough.

Q. All right, sir. Consult your sketch.

A. Here is Palm Street and N. & W. Railroad. This should be the interchange track right in here, I would say. I think this is it, right here.

Q. Orient yourself in connection with it and make yourself sure.

A. This thing is turned backward to me.

Q. All right. Turn it any way you would like.

A. I am looking at it upside down.

Q. That is the area you walked; is that right?

A. Yes. This should be the interchange, right along in here, in this vicinity. I am not too familiar with this map. It is along in here somewhere.

Q. I want you to put the switch on the interchange.

A. Well, from this map I am still not sure that is your interchange.

Q. Well, maybe if I could get another map. Do you think you could locate it more readily on the City of Hopewell map?

(Handing the witness another map.)

[fol. 71] A. This interchange is right in this vicinity, right in there somewhere.

Q. Put a big X there.

A. Right there (marking on the map).

Q. Now, go back to the classification yard. You were talking about the distance from the Hopewell classification yard to the interchange switch. Will you please continue? You were telling the Court the differences between your testimony and that of Mr. Moyrick, and the last point of difference was the distance from the switch at the classifica-

tion yard in Hopewell to the switch at the interchange track. That brings you right up to where you were.

A. The difference is not in the testimony, but my notes—I wanted to testify, that is, my notes show, that this distance was approximately 2,087 feet as computed by us.

Q. Now, have you finished with that distinction?

A. That's right. I am through.

Q. Will you, then, go on to the next point of difference?

A. There is no difference in the testimony between what I would have to offer and what Mr. Meyrick said. The only point that was not brought out was in connection with the N. & W. Railroad tracks.

Q. Well, what about it?

[fols. 72-73] A. The N. & W. Railroad together with the Seaboard Air Line serves these industries down in the vicinity of Continental Can, Allied Chemical, and Nitrogen. The cars to be delivered from the Seaboard to these plants are classified and bunched in the Seaboard classification yard at Hopewell. The cars that the N. & W. Railroad places to these same plants are classified and bunched in the N. & W. yard at Hopewell, the east end of which is almost adjacent—well, I would say it is almost equivalent to the Randolph Street crossing. That is the crossing that is protected with gates. So, trains from the N. & W. delivering to this plant would originate at this classification yard at Randolph Street and would traverse approximately 4,000 feet, that is, paralled with the Seaboard tracks leading into the plant, which would be under a mile distance.

Mr. Slipek: Do you have any other distinctions or differentiations to make?

The Witness: That is all I have.

[fols. 74-75] Roy E. Kean, called as a witness by and on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Hunton:

[fol. 76] Q. Mr. Kean, would you be good enough to describe to the Court the crossings, both of highways and of

other railroads, and the spur tracks breaking off from the Seaboard tracks from the Continental Can Company to the Hopewell classification yard, please, sir?

A. Starting at the Continental Can Company, there are four tracks which break out into this plant, two of which are controlled by the Norfolk & Western Railroad and two of which are controlled by the Seaboard. The two tracks controlled by the Seaboard, which lead in a southward direction to the switches at the plant of the Allied Chemical & Dye Company, some 3,000 feet, are known as the Hummel-Ross lead and the Roosevelt track. These are the two operating tracks that we use. There is a track breaking to the left into the Solvay Division of the Allied Chemical plant. There is a switch breaking to the right that goes into the Allied Chemical & Dye. In addition to the Norfolk & Western and the Seaboard operating over these tracks into both sides of the plant, the Allied Chemical & Dye also has engines which operate in that area, and there is a common road crossing known as Hopewell Street, where there is a crossing at grade with the Norfolk & Western Railroad and a [fols. 77-79] road crossing. You continue southward—no, that first street is Dupont Street and then you have Hopewell Street. You continue south and on a slight curve to Terminal Street, which is State Road No. 10, which is a crossing at grade protected by gates manually operated by what we term crossing watchmen.

Q. Is that the main traveled highway from Hopewell to Petersburg?

A. Well, frankly, I don't think so, Your Honor. There is some travel that way, but that is the main traveled way between Richmond and Norfolk, and farther southwest is State Road 36, which is the main traveled road between Hopewell and Petersburg.

Q. That is the one that goes in by Camp Lee?

A. Yes, sir.

Q. This is No. 10?

A. Yes, sir.

Q. It goes down toward Smithfield and Surry?

A. That is right; down in that area, there.

[fol. 80] By Mr. Hunton:

Q. Mr. Kean, is there any passenger service to Hopewell?

A. No passenger service.

By the Court:

Q. Do any of these tracks between the one terminus and the other which have been discussed today carry through trains?

A. None at all, Your Honor; all switching movements.

Q. All switching movements?

A. Yes, sir.

Q. No through traffic goes through there?

A. No, sir.

Q. Nothing is brought over those tracks by a train in the ordinary course of operation?

A. No, sir. Everything in this area is moved between our assembling yard, which is across Hopewell Street, which is just opposite the Hercules plant, and the various industries out in the Hopewell area.

[fol. 81] By Mr. Hunton:

Q. Mr Kean, are there any trains or cars delivered by a locomotive from a point toward Bellwood beyond the Hopewell yard limits that do not stop at the classification yard in Hopewell?

A. There are none, no.

By the Court:

Q. Let me ask one question there. If incoming freight consigned to Hopewell comes in, it goes first to the classification yard?

A. If I may describe it this way, an incoming freight train terminates at the classification yard and there the work is taken over by the yard or switch engine crew, whichever you may want to call it, but that is the terminus of the freight train.

The Court: I see.

By Mr. Hunton:

Q. What happens to the train when it arrives at the classification yard so far as the distribution of cars is concerned?

A. The cars are switched and blocked according to the consignee intended.

By the Court:

Q. Is this switching yard used by both the Seaboard and the Norfolk & Western?

[fols. 82-84] A. No, sir. There are two separate operations over there from a switching standpoint.

Q. This interchange is where——

A. That is where we interchange cars between the two lines.

Q. And not in your switching yards?

A. It is what we know as a designated interchange track.

Q. But that is not in the switching yard proper, is it?

A. It is within the switching yard limits. I will have to say that.

Q. What I mean to say is that it is not within the classification yard?

A. Oh, no.

The Court: I was using the term incorrectly myself.

By Mr. Hunton:

Q. Mr. Kean, if you would point out to His Honor on the plat the location of the Seaboard Classification yard and the location of the Norfolk & Western classification yard I think that might clarify it.

By the Court:

Q. The Seaboard classification yard is right here (indicating)?

[fol. 85] By Mr. Hunton:

Q. Now, Mr. Kean, what is the speed limit for the Hopewell yard area of the Seaboard?

A. In our Operating Rules our movements are termed "Yard Speed," which is the ability to stop within one-half the range of vision.

Q. Have you the rule book containing that rule?

A. Yes, sir, which rule is defined on page 11 of our cur-

[fol. 86] rent Operating Book.

By the Court:

Q. When you refer to range of vision, that will vary, I assume, over the track?

A. Oh, yes, and weather conditions.

Q. At points your vision is much farther than at other points?

A. That is right.

Q. As coming around a curve?

A. That is right.

By Mr. Hunton:

Q. What is the rule to which you referred? Read it into the record, please, sir.

A. It is our Yard Rule No. 93, which reads in part as follows:

> "Stations having yard limit boards will be designated in the time tables and by special instructions and the limits will be indicated by wayside signboards reading 'Yard Limits.' Trains and engines must not exceed yard speed on moving on yard tracks."

That is found in our Rule 93, page 31 of the current Rule Book of Operations.

Q. Do you know whether or not the yard at Hopewell is so marked?

[fols. 87-88] A. It is; yes.

Q. And is the yard at Hopewell so designated in your operating time table?

A. It is, and the current time table is Issue No. 4 which was issued effective December 3, 1956.

By the Court:

Q. Well, what about this rule concerning operating so you can stop within half the distance of visibility? Is that a written rule?

A. Yes, that is a written rule, found on page 10 of the Rule Book and the definition of "speed" is "a speed that will permit stopping within one-half the range of vision."

[fol. 89] By Mr. Hunton:

Q. Who determines when a train, or one of these cuts of cars, or whatever you call it, is to move out of the classification yard toward Continental Can?

A. That, of course, comes under the immediate jurisdiction of the agent, Mr. Morrison.

[fols. 90-91] Q. And who determines when a similar movement in the reverse direction, from Continental Can, is to be made?

A. Again, that would be the immediate supervisor, Mr. Morrison.

Q. How does a train crew know where to stop and cut off cars, if any, or where to pick up additional cars?

A. Generally speaking, it is based on the listing of the cars and on the instructions received from the agent, who is Mr. Morrison.

[fol. 92] Q. Mr. Kean, approximately when was the line established by the Seaboard into Hopewell?

A. To the best of my recollection, it was 1931 or 1932.

[fol. 93] Q. Do you have records with respect to accidents that may have occurred within the yard limits of Hopewell?

A. The records indicate that in 1941 there were two crossing accidents involving a train and vehicular traffic, one at Hopewell Street and one at Palm Street. There was another accident, in 1944, on the crossing at Hopewell Street, and there was another accident at Palm Street in 1954. That is the only record we have of any accidents occurring in that area.

By the Court:

Q. Were they collisions with motor vehicles?

A. Yes, sir.

By Mr. Hunton:

Q. Did any of those accidents occur at a time when air brakes were in use?

A. Strangely enough, the one occurring in 1954 occurred with an engine and twelve cars in which there were air brakes in service.

Q. Did the others occur when air brakes were used?

A. Air brakes were not in service.

By the Court:

Q. Am I correct in understanding from your answer that at times air brakes are in service in these movements and at other times they are not in service?

[fol. 94] Mr. Hunton: I was going to develop that, if Your Honor please, right now.

The Court: I beg your pardon.

By Mr. Hunton:

Q. Will you state over what period of time these movements into Hopewell yard have been handled with air brakes in use and over what period of time without the use of air brakes?

A. Air brakes were first used on these movements in Hopewell yard September 7, 1951. They were continued up until January 10, 1956.

By the Court:

Q. Prior to 1951 they had not been used at all?

A. They had not been used at all.

Now, along in the first part of September, there was a visit made to the Hopewell Terminal by Inspectors Roy and Dennis, I believe, at which time they voiced the opinion that the air brakes should be coupled on these movements and the Seaboard acquiesced in their request, and that was when it was first started. On January 10, 1956, mostly for operating reasons, we discontinued coupling the air on these cars and went back to the old procedure of operation, which resulted in the visit of Inspectors Roy and Meyrick on or about March 5 or 6.

[fol. 95] By Mr. Hunton:

Q. When did you start using air brakes again?

A. Pending the decision in this particular case, we started back to using air brakes on March 10, 1956.

Q. What has been the effect so far as time is concerned in the use of the air brakes?

A. It has affected the work in that it slows the work down, because, as has been described here this morning, the overall movement is slightly in excess of two miles. For example, you have a cut of cars, regardless of the number but we will take the average number of twenty cars, leaving the classification yard, on which all of the air hose have got to be laced and the train charged——

Q. Explain to the Court the technical terms "laced" and "charged."

A. The air hoses are the hose between each car which must be coupled between each car and, after that, they are coupled to the air hose on the locomotive which, in turn, is

attached to the compressor and pump and that charges the train line for the purpose of applying and releasing the brakes. Normally, you can figure fifteen to twenty minutes longer in getting a movement started, and then when you reach the ultimate end of the trip, or the run that you are making, before these cars can be switched out it is necessary that you then go along and bleed, by means of a bleed cock [fol. 96] which is attached to the reservoir and the air brake system on the car—the air has go to be bled off on every one of those cars and normally you can figure twenty minutes longer on that. So, on each movement that we operate we estimate that it takes forty minutes longer to make the movement than if we did not make the movement with the air brakes coupled.

By the Court:

Q. Does it require additional personnel?

A. Yes, sir. In fact, for the first time in the history of the operation at Hopewell, we had to put on five engines over there due to the operating difficulties we were running into over there, due to this and other things, which is two more than we ordinarily work over there.

Q. That was on account of the difference in time?

A. It was due to this. Of course, there were other things entered into it, too, but this was one of the contributing factors.

By Mr. Hunton:

Q. What is your estimate as to the increase in cost in the use of air hose?

A. Well, we figure with the crew wages alone on a switch engine crew it costs us ten cents an hour, and where three switch engines—and I believe it has been running that, approximately—ten moves are made between these various [fol. 97] industrial locations and the yard. Figuring ten moves at forty minutes to the move, that is 400 minutes. You can very readily see, if you have nearly an eight-hour minimum day, it will cost you around eighty hours a day, and based on 365 days a year, it is running in the vicinity of $30,000 a year for crew members alone.

By the Court:

Q. That is for additional crew members that you would not need otherwise?

A. That is right.

. . . . . .

[fol. 98] Q. Mr. Kean, do you go to Hopewell frequently?

A. Oh, yes.

Q. Have you seen the trains of cars and locomotives of the Norfolk & Western?

A. Oh, yes.

Q. Operating parallel to the Seaboard?

A. Yes.

Q. Have you observed whether they operate with air brakes or without air brakes?

A. They operate without air brakes.

Q. Have you ever seen them operate with air brakes on the Norfolk & Western in this particular area?

A. Not to my knowledge, no.

By the Court:

Q. Mr. Kean, do you have a record with respect to injuries to crew members in these operations during the period when you operated with and when you operated without air brakes?

A. We have had only two injuries that have occurred over there, to my knowledge, and neither of those was due in any way to the movement between industries and the [fol. 99] classification yard. In fact, these injuries that occurred, one of them occurred from a man getting off of a car in the process of switching in the classification yard, and the other one occurred when a man permitted his arm to slip and hang in a grab-iron while he was swinging on the car.

Q. Was the car moving?

A. The car was moving, but it would not have made any difference at all, because his hand slipped on the grab-iron.

Q. You mean they are the only injuries you have had in the yard over there?

A. They are the only ones I know of.

Q. Both of them were on classification movements?

A. Both of them were on classification movements.

Q. You had no injuries in this movement from the classification yard over to the industry?

A. Not that I know of, Your Honor.

. . . . . .

[fol. 100] Mr. Hunton: No further questions. The witness is with you.

Cross-examination.

By Mr. Slipek:

Q. Mr. Kean, I believe you stated that Route No. 10 was on Terminal Street, didn't you? Did I understand you correctly?

A. Possibly I did.

Q. I would like for you to consult a map and see if that is still your answer.

A. No, that is incorrect. Route 10 is south of Terminal Street.

Q. What street does it run over?

A. Randolph Street.

Q. Very well. Thank you, sir.

Now, you read to the Court from the book certain yard rules.

A. That is right.

Q. Are you telling the Court that those yard rules are always obeyed, sir?

A. To the best of my knowledge, I have got to answer that Yes.

[fol. 101] Q. All right, sir. Thank you.

Now, directing your attention to the four accidents—I do not have the dates—you say in one year there were two?

A. In 1941 there were two, one at Palm Street and one at Hopewell Street. I may have the month on that for you.

Q. No, that is not essential. Now, the next one occurred when?

A. 1944.

Q. And that was at Hopewell Street?

A. Hopewell Street, yes, sir.

Q. And the next one occurred at Hopewell Street?

A. No, at Palm Street, '54.

By the Court:

Q. Is Palm Street the crossing which has the manually operated——

A. No, sir, Randolph Street, or Route 10. The protection of these crossings where the accident occurred is the standard cross-buck signs.

By Mr. Slipek:

Q. The only street that has manually operated protection is Randolph Street?

A. That is right.

Q. And the others are protected by the cross-buck sign? [fols. 102-107] A. The others are protected by the cross-buck sign.

Q. You stated, "Mostly for operating reasons, and other reasons, we have discontinued the use of brakes." When was that?

A. That was in January; on January 10, 1956.

Q. What were those operating reasons that you have referred to here?

A. Trouble——

Q. Outside of the time element.

A. The time element definitely was involved.

Q. What other reasons?

A. Well; the operating reason was the dispatch and the receipt of the traffic coming in and out of that area. There was an increase, I would say, of some thirty or thirty-five percent in business in that particular area along about this time.

[fol. 108] Q. When you discontinued the brakes, then, what you actually did was equate the safety factor against the expense factor and decide to dispose of the brakes; is that right?

A. At no time did the equasion of the safety factor against the expense factor enter into the argument. We were trying to operate a railroad.

Q. Did you consider the safety factor?

A. The fact that there have been no accidents and no injuries occurring to employees and the fact that there have been so few crossing accidents or vehicular accidents, I think, speaks for itself.

Q. Did you take safety into consideration?

A. My friend, we always take safety into consideration.

Q. Then, did it enter into your deliberations as to whether you would discontinue these brakes or not?

A. Would you restate the question, please?

Q. I asked you whether you considered safety and your answer was that you did.

A. We always consider safety.

Q. And properly so. The next question was, Then you [fol. 109] did take safety into consideration when you decided to dispense with the use of these air brakes?

A. Definitely, we did.

Q. What were your thoughts then on the safety factor, at that time?

A. My thoughts were that there was no undue or unusual risk, and that is borne out by the fact that during the sixty-day period that we did operate there without the brakes nothing unusual happened; there were no injuries and no crossing accidents.

. . . . . .

[fol. 110] Joseph R. Hoag, called as a witness by and on behalf of the defendant, and being first duly sworn, testified as follows:

Direct examination.

By Mr. Hunton:

Q. Mr. Hoag, would you state your name, residence, and occupation, please?

A. Joseph R. Hoag; Jacksonville, Florida, is my residence; and my occupation, I retired from Civil Service employment and am doing a little work now for the Seaboard on a monthly retainer basis.

Q. Before your retirement as a Civil Service employee, what was your occupation?

A. I was an Inspector of Safety Appliances.

Q. And for what organization?

A. The Interstate Commerce Commission.

Q. How long were you employed in that capacity, Mr. Hoag?

A. Thirty-two years.

Q. Prior to that, what was your occupation?

A. I was working on the Northern Pacific for twenty years. I was a brakeman and conductor and two years as a Trainmaster.

Q. I think we have gone back far enough, Mr. Hoag.

Did you, at the request of officials of the Seaboard, make [fol. 111] any examination with respect to the movement of trains, or cuts of cars, or transfer movements from the classification yard at Hopewell to the industries between there and the James River?

A. I did.

[fol. 112] Q. Was there any difference between your duties and those of Mr. Meyrick, who testified here this morning?

A. No, they were the same duties.

Q. Mr. Hoag, would you state, in the light of your experience with the Interstate Commerce Commission, what in your opinion was the nature of the movement from the Hopewell classification yard to the Continental Can [fol. 113] Company?

A. I only made that one inspection up there; I have only been in Hopewell one time, and I made a report on it to Mr. Stone. I can read to you my report if you care to hear it.

Q. Did you consider it a train movement, a switching movement, a transfer movement, or what?

A. I considered it a switching movement.

Q. Did you so advise the Seaboard Air Line?

A. Yes.

Q. What were the factors that led you to that conclusion?

A. Well, I figured it was merely a switching movement for the distribution of cars to the different industries around Hopewell and was controlled by yard speed, which was a speed that enabled them to stop within one-half the range of vision. I believe two railroads crossed at grade. Those railroads were spur tracks of the other line and they were protected by fixed signals, namely, a stop board on that line where their trains had to stop before crossing over the Seaboard tracks; the Seaboard had the right of way. The most important crossing was protected by gates. The other

crossings were protected by railroad crossing signs, what we call cross-buck signs, and the speeds being so slow and the number of cars— I asked about the average number of [fols. 114-115] cars that were handled in the train and they said it would run around twenty-five cars, the average number, and, moving at yard speed, I figured the engineman could control the speed of the train and stop within one-half his range of vision and there would be no danger in the movement.

[fol. 116] Q. Is the question of whether the movement takes place on a main line or on a yard track material?

A. Not too much. A violation can take place on a yard track provided that there are safety hazards on it and other trains using it, and whether the view is good, and whether the speed is regulated on that track.

Q. Is the fact that other trains move from one destination to another a material consideration—between two stops, say?

A. Yes, it is a material consideration, but it is not a binding fact.

Q. In determining whether it is a train movement, does the question of whether there are movements on regular schedule enter into the question?

A. Yes, it would have something to do with it.

Q. If the movement were a scheduled movement, would you consider it more likely to be operated as a train movement or as a shifting movement?

A. I would be more likely to treat it as a train movement.

. . . . . .

[fol. 117] Cross-examination.

By Mr. Slipek:

. . . . . .

[fol. 118] Q. I wanted to clarify that in my mind. Thank you, sir. Then, sir, you have no knowledge of your own in regard to the four movements with which we are concerned today?

A. No, sir.

Q. None whatever?

A. None whatever.

Q. And you did not render an opinion on these particular four movements, did you?

A. No.

Q. Isn't it true that in your duties as an inspector for the ICC you could have a non-scheduled movement and it would still be held to be a train movement rather than a switching movement?

A. Oh, yes. Extra trains are non-scheduled trains on any railroad.

Q. And isn't it true that in the course of your duties the yard speed could be exactly that in the book and it could still be held to be a train movement instead of a switching movement? Do you understand that?

A. Repeat that.

Q. My question is this, sir: In your investigations con- [fols. 119-120] ducted while you were an ICC inspector, isn't it true that you could have had a situation in which the train and the cars maintained the yard speed and yet it could be considered to be a train movement instead of a switching movement?

A. Oh, yes.

Q. And that would be likewise true even if there were a switching crew on the train?

A. Yes.

Q. And it would also be true no matter how many cars were on it; isn't that right?

A. Yes.

Q. That is what I was getting at. May I see that booklet, please?

A. (Handed to counsel) Do you want me to open it?

Q. No, sir, but will you tell the Court the date of that booklet, please?

A. It is July 1940.

Q. Isn't it true that there have been some changes in that book and some supplements to it since that time?

A. Yes, very true. There is a supplement issued every year.

Q. And these supplements do sometimes contain changes, do they not?

A. Yes.

[fol. 121] W. F. Morrison, called as a witness by and on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Hunton:

Q. State your name, residence, and occupation, please.

A. W. F. Morrison; residence, Hopewell, Virginia; occupation, Agent for the Seaboard Railroad.

[fol. 122] Q. How long have you been Agent for the Seaboard at Hopewell, Mr. Morrison?

A. Since March of 1954.

Q. How long have you been employed by the Seaboard?

A. Since January of 1937.

Q. State briefly, if you will, please, what your duties are as agent of the Seaboard at Hopewell.

A. The supervision of the entire terminal.

Q. That is the reason I said "briefly." What in general are those duties?

A. Well, the supervision of the yard, the agency, the mechanical department, and any problems that may come up with the company.

Q. What is your relationship to the movement of cars into or out of the Seaboard classification yard at Hopewell?

A. Well, we issue instructions to our yard people as to the destination, as to where the cars on the outbound move go and, on the inbound move, as to what industries they are to be placed at. Of course, we accept the orders for the loads, and where to be spotted, and what empties to be placed.

Q. For instance, in connection with an order for cars to move out of the Atmospheric Nitrogen plant of Allied Chemical, how would that order be handled with you?

[fol. 123] A. Well, sir, the plant furnishes us with a list with the correct initial and number, and that information is passed on to the yard people to go to the plant and pull those cars and line them up in the train accordingly.

Q. State whether or not that movement of the engine comes under your jurisdiction.?

A. Yes, sir.

Q. Where is your office, Mr. Morrison?

A. The office is in the freight station.

Q. Where is that with reference to the classification yard and with reference to the Continental Can Company plant?

A. Do you mean in distance?

Q. Yes. Approximately how far is it from each of those places, one at one end and one at the other?

A. Well, I would say approximately half a mile from the Continental Can—I am speaking of the office to the yard now—from the A.C.D. Corporation——

Q. And where is the office with respect to the interchange for the Norfolk & Western? About how far apart are they?

A. Just about two blocks from the Norfolk & Western. I am speaking of their office, now.

Q. How far is it from the interchange track?

A. Less than half a mile.

[fol. 124] Q. Have there been any accidents during the time that you have been the agent at Hopewell, either crossing accidents or injuries to train personnel, Seaboard employees?

A. As to the crossing accidents, there has been none, sir. Now, you say injuries to the Seaboard personnel?

Q. Yes, to employees.

A. We refer to a personal injury, now. A trainman stepping down from the sill step left his arm hanging in the grab-iron. That had nothing to do with the movement of the train.

Q. Where did that occur?

A. One was in the classification yard and the other was in the Cal track. The train had come to a complete stop and the man stepped down and left his arm in the grab iron.

Q. What are the protections provided at the several street crossings? I believe it has been testified that Route 10 crosses the Seaboard track here in Hopewell.

A. Yes, sir. That is the Randolph Road crossing.

Q. What kind of crossing protection is there?

A. They have gates.

Q. And what is the crossing protection provided at the other street crossings?

A. They have cross-bucks.

Q. That is the——

A. Cross-arms.

[fol. 125] Q. How many street crossings are there between the Continental Can Company's plant and the classification yard?

A. Do you want me to name them?

Q. If you can, yes, sir, and use the plat if you want to refresh your memory.

A. No, sir, I know them from memory.

Coming off the Hummel-Ross lead, or the Continental Can lead, first, proceeding to the yard, we cross Dupont Street; next would be the Terminal Street crossing; next, Randolph Road; your footpath; another little crossing going into Tubize that doesn't even have a name; then you come over to Hopewell Street; then your Palm Street crossing; and you enter the yard.

Q. Which is the most heavily traveled of all those?

A. Of course, the Randolph Road crossing is the most heavily traveled.

Q. How about the Terminal Street crossing? How much volume of traffic is up there?

A. I could not give you the exact number of cars——

Q. If you could give something in comparison with the Randolph Street crossing. That is what I mean.

A. Oh, there is practically nothing there as compared with Randolph Street. Randolph Street is the main highway there.

Q. How about the Dupont Street crossing?

[fol. 126] A. Well, of course, your cars coming from the plants, or employees of the plants going back and forth through there, there is considerable traffic through there.

Q. What times do changes of the traffic occur?

A. I would say in the morning around seven a. m., and in the afternoon about four or four-thirty, when the plants are changing shifts, or three-thirty.

Q. What is the hour—I don't mean the precise hour, but when are these movements into and out of the Allied Chemical & Dye and the Continental Can generally made?

A. Normally, the movements into the plants are made in the morning. That is the delivery of the empties.

Q. At what time?

A. We have to get in there at ten a. m., and coming out, pulling the loads in the afternoon, any time from four o'clock up to seven or eight at nighttime.

Q. What about the Hopewell Street crossing? What is the volume of traffic there as compared with the Randolph Street crossing?

A. The Hopewell Street crossing is the crossing that handles the traffic that moves into the Hercules Powder Company plant. That is practically all the traffic that moves in there.

Q. What time does the traffic move into and out of that [fol. 127] plant, generally?

A. Prior to eight a. m., and at four o'clock in the afternoon; between three-thirty and four in the afternoon.

Q. I think you said that there was a footpath in there. By whom is that used?

A. I think some of the people that live in B Village over there use it to go to the grocery store. It is just a little old path that they have been using there for years. I don't know of anybody that actually uses it other than those people that live around there.

Q. Now, the next crossing, I believe, is Palm Street, isn't it?

A. Palm Street, is correct.

Q. What is the traffic on Palm Street as compared to Randolph Street?

A. Well, the Palm Street traffic is much lighter than the Randolph Street traffic, because the people going to Petersburg, leaving the Hercules plant, come across Hopewell Street and come up Palm Street and head toward Petersburg and Colonial Heights. That is mostly in the afternoon, too, and in the morning.

Q. What is the next crossing, please?

A. Going into the yard?

Q. Going into the yard.

A. Palm Street would be the last one.

[fol. 128] Q. What is the one before that?

A. I beg your pardon. It is Hopewell crossing, going into the yard. Palm Street is the one just prior to that.

Q. What is the plant that has been closed down and moved to South America?

A. Well, that is the old Tubize. Celanese Corporation is the one that moved to Charlotte.

Q. Which street serves the old Tubize plant?

A. Well, sir, the Palm Street crossing, which crosses our tracks going into the Hercules lead track, and also the lead of the Norfolk & Western going into Hercules.

Q. Mr. Morrison, where is the Norfolk & Western track located that serves the Allied Chemical plant and the Continental Can plant?

A. It is adjacent to our track, right there at the freight station, going into the plant.

Q. Does it run parallel or across your tracks?

A. It runs parallel by the freight station.

Q. Can you see the trains moving on the Norfolk & Western tracks fronr your office window?

A. Definitely so, sir.

Q. Can you see whether or not the air brakes are connected on those trains?

A. Yes, sir.

[fols. 129-132] Q. In your observation, have you ever seen the air brakes connected on those Norfolk & Western movements by your window?

A. Not to my knowledge, no, sir, not going into the plant or coming out, no, sir.

Q. When I was in the office the other day, did you notice the Norfolk & Western train passing?

A. Yes, sir.

Q. Was the air brake connected on it?

A. It was not, no, sir.

Q. Where was that movement on the Norfolk & Western going?

A. Sir, they were pulling empties out of the plant at that time.

Q. What plant was that?

A. Allied Chemical & Dye.

[fol. 133] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 134] In United States Court of Appeals for the Fourth Circuit.

No. 7534

United States of America, Appellant,

versus

Seaboard Air Line Railroad Company, Appellee

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond

Argued March 6, 1958.

Before Sobeloff and Haynsworth, Circuit Judges, and Williams, District Judge

Edwin J. Slipek, Assistant United States Attorney, (L. S. Parsons, Jr., United States Attorney, and Henry L. Hilzinger, Attorney, Interstate Commerce Commission, on brief) for Appellant, and Lewis Thomas Booker and Eppa Hunton, IV, (Hunton, Williams, Gay, Moore & Powell on brief) for Appellee.

[fol. 135] Opinion—Decided June 30, 1958

Haynsworth, Circuit Judge:

This is a proceeding under § 6 of the Safety Appliance Act (45 U.S.C.A. § 6) to collect the statutory penalties for violations of the Act. The violations are said to have occurred when, on four occasions, the railroad moved cars without coupling their brakes so that they could be operated by the engineer. It is admitted that, in each instance, the only operable brakes were those upon the engine, so the only issue is whether or not the movements were train movements within the contemplation of the Act (45 U.S.C.A. § 9) and the supplementary orders of the Commission.

In distinguishing between "train movements," in which the brakes of the cars must be coupled and operable, and switching movements, in which they need not be, courts have considered so many circumstances as affecting the character of the movement that we should first refer to the trackage and operations of the Seaboard in Hopewell, Virginia, where the movements occurred.

Hopewell, Virginia, is served by a branch line of the Seaboard which connects with the main line at Bellwood and terminates at Hopewell. Incoming trains from Bellwood arrive at a classification yard where they are broken up and from which the cars are distributed to consignees in Hopewell. Much of the distribution is effected over a lead track, which winds through the industrial section of Hopewell for a total distance of approximately two miles. Nine spurs, springing from the lead track, serve industrial customers whose plants are adjacent to them, and some of them are used for car storage. The spur, or customer lead, track most distant from the classification yard serves a plant of [fol. 136] Continental Can Co., while the one second in distance from the classification yard serves a plant of the Allied Chemical & Dye Co. A track for the interchange of traffic with the Norfolk and Western also springs from the lead track at a point approximately midway between the classification yard and the end of the lead at Continental Can Co.

The Norfolk and Western has lead tracks paralleling the Seaboard lead throughout most of the length of the latter, and several of the Norfolk and Western industrial spurs cross the Seaboard lead track. At such crossings, the Seaboard has the right of way, and Norfolk and Western crews must bring their engines to a complete stop before crossing the Seaboard lead track. The leads of both railroads cross several streets and private ways. The crossing of one of these streets, a state highway carrying a substantial amount of traffic, is protected by a watchman and manually operated gates. The crossings of other streets and ways are protected only by stationary signs.

There is no perceptible grade on the Seaboard lead, and all movements over it are at yard speeds and under yard control. It is a part of the Hopewell Yard, and serves no purpose other than the distribution of cars from inbound trains broken up in the classification yard and the assembly of cars to be made up, in the classification yard, into outbound trains.

When an incoming train has been broken up in the classification yard, a switch engine couples on to those cars which are to be delivered over the lead track. Acting under orders of the local freight agent, the switching crew proceeds to distribute the cars over the lead track. Those consigned to

[fol. 137] customers on Seaboard spurs are spotted on the appropriate spur, while those destined to points on the Norfolk and Western are placed upon the interchange track. Because of the specialized needs for different types of cars,[1] the crew may be required, enroute, to pick up cars from storage tracks and place them upon other spurs for loading. On the return trip,[2] the switching crews pick up from the spurs loaded outbound cars and empty cars for which the customer has no need, and, from the interchange track, cars which had been placed there by the Norfolk and Western for delivery to the Seaboard. These cars are then distributed to storage tracks breaking from the lead track or to the classification yard as circumstances may require. Outbound cars are then made up in the classification yard into an outbound train.

No question has been raised about any movement in either direction over the lead track during which the crew worked a spur relatively near the classification yard. It is asserted, however, that an isolated movement in either direction becomes a train movement if only the more distant spurs are worked. Thus, the charges here are based upon two movements from the classification yard to the Continental Can lead track without intermediate stops and upon two movements from the Allied Chemical lead track to the classification yard during at least one of which there was [fol. 138] an intermediate stop en route to pick up additional cars from the interchange track.[3]

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[1] Most of the material delivered to Allied Chemical & Dye, for instance, is in coal hopper cars and boxcars, but most of its product is shipped out in tank cars.

[2] It is possible that the operation in the two directions may overlap to some extent. If cars are to be delivered to a spur and other cars picked up from the same spur, it may be that both operations would be performed at the same time, but the record before us does not disclose the practice here.

[3] On one of the movements toward the classification yard, the engine left the Allied Chemical lead track with twenty nine loaded cars, stopped at the interchange track to pick up six loaded and fourteen empty cars and arrived at the classification yard with forty-nine cars. On the other ques

The fact that less than all of the nine spurs may be worked during a particular movement has no controlling significance. Nor do we believe the answer is to be found in an identification of the spurs actually worked. The nature of the work, its purpose and character are precisely the same, whether every other spur is to be worked, only those between the classification yard and the interchange track or only those, or one of them, between the interchange track and the end of the lead track. Whether these spurs are to be worked or those, the business of the switch engine and its crew here is the distribution of cars from trains which have completed their over-the-line run and the collection and assembly of cars to be made up into outgoing trains.

Nor do we accept the Government's contention that "since the defendant moved (cars) between designated points in its yard for a distance of about 2 miles without picking up or setting out any car enroute," the movement [fol. 139] must necessarily have been a train movement requiring operable train brakes. Substantially every switching operation involves such movements, many for comparable distances, but they take on the appearance of train movements only when lifted from their context of switching operations and separated from their function and purpose. It is not enough, ignoring what transpires before and what follows, to say that cars were moved from this point to that; the character of the operation is to be determined by a look at the whole and with due regard to all elements of its setting.

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tioned movement in that direction, records of the railroad indicate the engine left the Allied Chemical lead track with four loaded and one empty car, stopped at the interchange track to pick up one loaded and twenty empty cars and arrived at the classification yard with twenty-six cars, but an inspector for the Commission had testified that all twenty-six cars were moved from the Allied Chemical lead track without a stop at the interchange track.

The two movements from the classification yard to the Continental Can lead track were of twenty-eight and twenty-three cars, respectively. In each of these movements, some of the cars were ahead of the engine and others were behind it.

Thus viewed, we agree with the District Court that these movements were properly classified as switching movements. In the average day there were ten of such movements, and they do not fall into separate categories solely upon the basis of a classification, in terms of relative distance from the classification yard, of the spurs worked. The lead track, the spurs that break from it and the classification yard are all parts of one yard, and its extremities are not so distant as to deprive a movement from one end of the yard to the other of the flavor of its function in breaking up and making up trains.

Unlike other sections of the Safety Appliance Act which apply to the use or haulage of a locomotive or a car, the train brake provisions apply only to the running of trains. The difference in language is an appropriate expression of Congressional intention, in the adoption of the train brake provisions, to distinguish between an over-the-line run, during which the need of useful train brakes was great and obvious and compliance with the requirement would not unduly hinder railroad transportation, and switching operations, during which there is little or no need for train brakes and general and strict compliance with the requirement [fol. 140] would be impossible or highly impractical. The distinction was pointed out by the Supreme Court in the first case involving the train brake provisions to come before it. *United States* v. *Erie Railroad Company*, 237 U. S. 402, 35 S. Ct. 621, 59 L. Ed. 1019, and, a week later, the Supreme Court declared the controlling test to be "the essential nature of the work done." *United States* v. *Chicago, Burlington & Quincy Railroad Company*, 237 U. S. 410, 35 S. Ct. 634, 59 L. Ed. 1023.

But movements of trains and cars are so varied that the distinction between the fast, through train and the simplest switching operation is not always easily applied. Functionally, a transfer movement between separated yards may be a switching operation, but, particularly if it moves over main line tracks, it has elements of similarity to movements between major terminals and many of the underlying reasons for the train brake requirement are present. Train brakes are usually required in such movements. *United States* v. *Erie Railroad Company*, 237 U. S. 402, 35 S. Ct. 621, 59 L. Ed. 1019; *United States* v. *Chicago, Burlington*

& Quincy Railroad Company, 237 U. S. 410, 35 S. Ct. 634, 59 L. Ed. 1023; *Louisville and Jeffersonville Bridge Co. v. United States*, 249 U. S. 534, 39 S. Ct. 355, 63 L. Ed. 757; *United States v. Northern Pacific Railway Company*, 254 U. S. 251, 41 S. Ct. 101, 65 L. Ed. 249; *Chesapeake & O. Ry. Co. v. United States*, 4 Cir. 226 F. 683; *Illinois Central R. Co. v. United States*, 8 Cir., 14 F. 2d 747; *Chicago & E. R. Co. v. United States*, 7 Cir., 22 F. 2d 729; *United States v. Southern Pacific Co.*, 9 Cir., 60 F. 2d. 864; *United States v. Southern Pacific Co.*, 9 Cir., 100 F. 2d 984. Movements for the distribution and collection of cars have been held subject to the train brake provisions when conducted over main line tracks, *United States v. Panhandle & Sante Fe Ry. Co.*, 5 Cir., 203 F. 2d 241; *United States v. Thompson, Trustee*, [fol. 141] 8 Cir., 252 F. 2d 6, but similar movements over yard tracks have generally been held to be exempt switching operations. *United States v. Great Northern Ry. Co.*, 9 Cir., 73 F. 2d 736; *United States v. New York, C. & St. L. Ry. Co.*, 7 Cir., 77 F. 2d 215; *United States v. Elgin, J. & E. Ry. Co.*, 7 Cir., 182 F. 2d 1; *United States v. Chicago, Burlington & Quincy R. Co.*, 7 Cir., 199 F. 2d 223; *United States v. Pennsylvania Railroad Co.*, D. C., Md., 80 F. Supp. 965; *United States v. Great Northern Ry. Co.*, W. D., Wis., 103 F. Supp. 889; *United States v. Staten Island Rapid Transit Railway Company*, E. D., N. Y., 151 F. Supp. 911. Cf. *United States v. South Buffalo R. Co.*, 2 Cir., 168 F. 2d 948. Even though the movements with which he was concerned were over main line tracks, Judge Hutcheson, now Chief Judge of the Court of Appeals for the Fifth Circuit, held that the train brake requirements were inapplicable because of the short distances between the spurs to be worked. *United States v. Texas & N. O. R. Co.*, S. D., Texas, 13 F. 2d 429.

The movements here were not over main line tracks, nor even inter yard connecting tracks. They moved, entirely within the confines of one yard, over a lead track only two miles long from which there sprang nine spurs and an interchange track. Since the nature of the work was clearly the distribution and collection of cars following the breakup of trains and preparatory to the make-up of others, we are convinced they were switching operations, exempt from the requirement of train brakes.

The classification of cars, narrowly considered, is but one of several exempt switching activities. Spotting cars upon

a team track alongside classification tracks is equally exempt. Delivering cars to spurs is no less typical of [fol. 142] switching than classification, and the considerations which exclude the one from the train brake requirement are applicable to the other. Movements over the lead track, from one spur requiring attention to the next, are an inseparable part of the switching activity, when the lead track is used, in fact, as an integral part of a yard in which the cars have been received or from which they are to be dispatched. Nor can we say, having due regard for the nature of the track, its connections and its use, that two miles is an unreasonable distance to travel without train brakes, when the "nature of the work done" is so clearly switching.

Much of the emphasis in the submission of the case has been upon the crossings of streets and of spurs of the Norfolk and Western, the Government pointing to them as potential hazards, while the railroad advances its safety record under the precautions of yard rules and asserts that the use of train brakes will increase, rather than minimize the risk of injury to trainmen, for they will be required to pass between the cars to couple the hose. Consideration of such crossings of streets and tracks is not irrelevant, for they are a part of the physical setting in which the movement must be viewed in order to determine its nature and character. A switching operation does not cease to be a switching operation, however, merely because the movement crosses a highway or spur track. Many an industrial spur crosses a public or private way, but spotting a car on such a spur does not become a line haul on that account. Movements over or across main line tracks may stand upon a different basis, where the switching movement becomes a potential hazard in the operation of main line trains, but crossing other yard tracks is a common incident in switching and their ownership by another railroad is not a significant circumstance.

[fol. 143] It is not contended here that the Act properly or rationally may be construed to require the use of train brakes on every switching movement which crosses streets or highways or the yard tracks of another railroad. On the contrary, it is conceded that movements over these same crossings are exempt from the requirement if shifting is

done relatively near the classification yard, a circumstance having no relation to the suggested hazard of the crossings. Whether or not a car has been placed upon a particular spur, the risk of collision with vehicular traffic at Randolph Street, and the other crossings, is precisely the same.

Where Congress has commanded the use of train brakes, the courts cannot excuse a failure to use them because of the use of other devices and measures, however effective in assuring safety they may be. If it were accepted that the Act should be construed to require train brakes whenever their use would contribute substantially to the safety of operations, an appraisal of the effectiveness of other measures would be necessary to decision, but it is not even contended that the Act has any such meaning.

Equally irrelevant, if Congress has required the use of air brakes, is consideration of the substantial cost to be imposed upon the railroad and of delay in the handling of freight. But if the use of train brakes on these movements is costly, delays shipments and creates new risks of injury without substantially contributing to the alleviation of existing risks, it is a reminder that courts should not extend the requirement beyond the intention of the Con-
[fols. 144-145] gress or needlessly chip away major portions of the long established exemption of switching operations.

Affirmed.

Separate opinion by Sobeloff, Circuit Judge, concurring in part and dissenting in part.

[fol. 146] In United States Court of Appeals for the Fourth Circuit

No. 7534

United States of America, Appellant,

versus

Seaboard Air Line Railroad Company, Appellee

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond

Argued March 6, 1958. Decided June 30, 1958

Opinion by Sobeloff, Circuit Judge, Concurring in Part and Dissenting in Part—Filed July 10, 1958

Before Sobeloff and Haynsworth, Circuit Judges, and Williams, District Judge

Edwin J. Slipek, Assistant United States Attorney (L. S. Parsons, Jr., United States Attorney, and Henry L. Hilzinger, Attorney, Interstate Commerce Commission, [fol. 147] on brief) for Appellant, and Lewis Thomas Booker and Eppa Hunton, IV, (Hunton, Williams, Gay, Moore & Powell on brief) for Appellee.

Sobeloff, Circuit Judge, concurring in part and dissenting in part:

After four and one-half years of operating its railroad cars between the Hopewell classification yard and the plants of the Continental Can Company and Allied Chemical & Dye Company in compliance with the airbrake provisions of the Safety Appliance Act (45 U.S.C.A., Sec. 9), the defendant, in March, 1956, ceased using airbrakes. I cannot agree that the change in practice was legally justified, and after consideration of the very persuasive majority opinion, I am nevertheless constrained to dissent from the holding that none of the four movements in question constitutes a "train" movement within the meaning of the Act. As to three of them at least, those in which there was no

picking up or shunting of cars en route,[1] the Act seems clearly applicable.

The facts of the case have been painstakingly stated and, with few exceptions, require no amplification. These exceptions are, however, crucial. It should be mentioned as more than coincidence that three of the four movements were accomplished without stops en route. The defendant's own evidence is that Seaboard's agent at Hopewell, Mr. [fol. 148] Morrison, customarily receives lists from the various industrial plants along the line, informing him of the cars to be picked up by Seaboard. The "yard people" are then issued instructions as to the cars to be moved to and from the plants. Therefore, as to the first movement in question (count number 1), when Seaboard's crew coupled together an engine and 26 cars at the Allied Chemical and Dye Company plant on March 5, 1956, it was known to them that they would proceed, non-stop, for a distance of two miles, and, in the second movement on that day (count number 2) and the one in question which occurred the next day (count number 4), 28 and 23 cars, respectively, were assembled for uninterrupted two-mile runs from the Hopewell classification yard to the Allied Chemical and Dye Company and the Continental Can Company's plants. Except for their role in the topographical setting, therefore, the presence of a number of other closely-spaced industrial spurs which may, at different times, be worked is irrelevant to this case. The fact that, on other occasions, frequent stopping and shifting of cars might make the process of coupling and uncoupling airbrakes utterly impractical, is equally unimportant so far as the movements here involved are concerned. This feature of the case should not be ignored.

The question, then, is whether a train, to be subject to the Act, may consist of a locomotive and 23 or more cars which have been either assembled from incoming trains or picked up at one location, and which are to proceed, non-stop, for a distance of approximately two miles, where, at

[1] Although there was a conflict in the evidence whether one or two of the movements were interrupted by switching operations en route, the District Judge resolved the conflict by finding a stop for switching in only one of the four, the one alleged as the third violation.

their destination, they are either unloaded or reassembled into outgoing trains.

In terms, the Act requires airbrakes to be used on "all trains . . . used on any railroad." As my colleagues have [fol. 149] observed, however, the Supreme Court, in a series of four cases, drew a distinction between "train" and "switching" operations, ruling that the airbrake requirement was inapplicable to the latter, and declaring the test to be "the essential nature of the work done."

The character and extent of the "switching" exemption, and the relative weight due the various criteria in the application of the "essential nature" test, can best be ascertained by examining and appraising the various contexts in which they were judicially created and authoritatively applied. Resort to the Supreme Court cases, in some detail, becomes necessary.

The first was *United States* v. *Erie R. R.*, 237 U.S. 402, decided by a unanimous Court in 1915. The defendant railroad operated a freight yard at Bergen, New Jersey, where regular eastbound freight trains were stopped and broken up and regular westbound freight trains made up and started. Following the break-up of the eastbound trains, and before the assembly of westbound trains, temporary groupings of cars, known as "transfer trains," were made up and moved to and from two other freight yards. The first, the Jersey City yard, was located two miles from Bergen, and the other, the Weehawken yard, three and one-half miles from Bergen. The trains ran only between these yards, usually had about twenty-five cars, carried no caboose, were operated by crews and engines specially engaged in that service, and at irregular intervals under the orders of yardmasters, at speeds of seven to eighteen miles per hour. Without using the requisite number of airbrakes, nine transfer trains were hauled from Jersey City to Bergen, six from Bergen to Weehawken, two from Weehawken to Bergen, and one from Bergen to Jersey City. These operations, similar to the ones in question here, were held to be [fol. 150] train operations within the meaning of the Safety Appliance Act.

It is, of course, arguable that a distinction exists between the work done in *Erie* and the instant case, in that the cars here were being hauled to and from their ultimate con-

signees, whereas in the *Erie* case, the cars received by the Jersey City and Weehawken yards were then to be delivered further to their industrial and commercial consignees. Such a distinction, if suggested, would not be a valid one, and the *Erie* opinion itself refutes it. In summing up the decision in *Erie*, the Court, through Mr. Justice Van Devanter, said: "We, therefore, conclude and hold that it [the airbrake provision of the Safety Appliance Act] embraced these transfer trains. Its applicability to this class of trains was considered and sustained in . . . *United States* v. *Pere Marquette Railroad*, 211 Fed. Rep. 220 [D. Ct. W. D. Mich., 1913]. . . ." The approval and adoption by the Supreme Court of the decision in *Pere Marquette* is significant, because the District Court held in that case that the transfer of a string of 17 cars, assembled from incoming trains which had been broken up, for a distance of two miles within the general yard limits of the City of Grand Rapids, the cars to be unloaded at their destination, constituted a "train" movement within the meaning of the Safety Appliance Act. Thus, as early as the *Erie* case, it was decided that a "transfer train" may consist of a string of cars hauled a short distance for unloading as well as further forwarding.

A week after its decision in *Erie*, the Supreme Court rendered its decision in the second of the pertinent cases, *United States* v. *Chi., Burl. & Q. R. R.*, 237 U.S. 410 (1915). Again dealing with transfer trains hauled for a short distance (2 miles), this time around Kansas City, Missouri, [fol. 151] the Court concludes that the trains in question were "exposed to the hazards" which the airbrake provision "was intended to avoid or minimize," and the movements were held to be train movements. P. 412. The railroad argued that the work of moving the transfer trains was being done by switching crews, and in answer to this contention, the Court formulated what has become known as the "essential nature" test: "Neither is it material that the men in charge were designated as yard or switching crews, for the controlling test of the statute's application lies in the essential nature of the work done rather than in the names applied against it." P. 413.

In the third of the Supreme Court decisions, *Louisville &c. Bridge Co.* v. *United States*, 249 U.S. 534 (1918), moving, for a distance of three-quarters of a mile, a string of

26 cars which had been assembled for delivery to another railroad, was held to be a train movement. Mr. Justice Clarke, writing for the Court, stated: "An engine and twenty-six cars, assembled and coupled together, not only satisfies the dictionary definition of a 'train' of cars, but would certainly be so designated by men in general and in any fair acceptation of the term must be regarded as constituting a train within the meaning of the statute." P. 538. Discounting the argument that the work done was merely part of a switching operation, Justice Clarke pointed out that the features considered generally as constituting exempt switching movements, were not present: "The work done with the cars, as described, was not a sorting, or selecting, or classifying of them, involving coupling and uncoupling, and the movement of one or a few at a time for short distances, but was a transfer of the twenty-six cars as a unit from one terminal into that of another company for delivery, without uncoupling or switching out a single [fol. 152] car, and it cannot, therefore, with propriety be called a switching movement." P. 538.

Finally, in *United States* v. *Northern Pac. Ry. Co.*, 254 U.S. 251 (1920), the Supreme Court was presented with a fact situation almost identical to the one in question here, and again without dissent, the Court held that the movements involved constituted train movements. The history of the *Northern Pac.* case is interesting for two reasons. First, the facts are more fully developed in the Court of Appeals opinion and, second, the Court of Appeals, which was reversed, took the same approach to the case as have my colleagues here.

South of the main tracks at Duluth, Minnesota, were several tracks known as the "Duluth Terminal" or "D. T. Tracks." They were operated as a single yard, and no part of them was ever used by any trains running between stations, freight or passenger, but, as in our case, they were used "exclusively . . . to supply the industries along these tracks with loaded cars or empties to be loaded for outgoing freight, for delivery to the main line." 244 F. 655, 657, 658. The trains were not operated according to fixed schedules, but were moved under the yardmaster's orders at such speeds that they could be stopped at vision. Two strings of freight cars, consisting of 40 and 48 cars, respec-

tively, were run along this line for a distance of approximately 4 miles at speeds varying between three and eighteen m.p.h. The Court of Appeals for the Eighth Circuit thought the earlier Supreme Court cases distinguishable in that the movements involved in those cases were along main line tracks and not devoted exclusively to the servicing of local industries. Affirming a directed verdict for the defendant railroad, the Eighth Circuit held: "From these facts no other conclusion can be reached than that of the learned [fol. 153] trial judge, that these train movements were mere switching operations, and therefore not within the airbrake provision of the Act of Congress, as determined in the Erie and Chicago, Burlington & Quincy Railroad cases, supra." 255 F. 655, 658.

The Supreme Court, in an opinion by Justice Brandeis, disagreed. It held that the movements along the D. T. Tracks in the Duluth area were movements of transfer trains within the doctrine of the three prior cases, and were not switching operations exempt from the Act. The Supreme Court found it "material" that the tracks crossed two streets at grade; five tracks of other railroads, one of which carried passenger trains; and that, for a distance of about one mile, two other railroad companies, "under the usual traffic-right agreements," also used the D. T. Tracks for delivering cars to consignees. Although, at two intermediate points along the D. T. Tracks there were 9 and 6 tracks, respectively, where cars were frequently set out or picked up by the transfer trains, the Court noted that the two movements in question were accomplished without stops. The fact that on other occasions the locality was used for switching operations was not permitted to outweigh the fact that at the times under inquiry, no stops were made to switch cars. In our case, not only were there no such stops but, as before mentioned, three of the runs were begun with the fore-knowledge that no stopping or switching would be required.

In answer to the argument that the trains were not operated on a main line, Justice Brandeis stated that if use of a main line were essential, the requirement would be satisfied by the presence of other freight trains, quoting the language of Justice Van Devanter in the *Chi., Burl. & Q. R. R.* case that the defendant's trains and those of other

[fol. 154] railroads "which the statute was equally designed to protect," "were exposed to the hazards which that provision was intended to avoid or minimize." 254 U.S. 254. "But," continued Justice Brandeis, "there is nothing in the Act which limits the application of the provision here in question to operations on main line tracks." Thus he made it plain that even if there had been no other trains using the tracks, the legal result would have been the same.

The inescapable rationale of the four Supreme Court cases, as developed and refined in the *Northern Pacific Ry. Co.* case, is that transfer movements, even of the nature shown here (to and from industrial and commercial consignees), and even on tracks specially used for that purpose, are train movements subject to the airbrake provisions of the Act if they are not accompanied by the picking up and delivery of cars en route (which would necessitate the frequent coupling and uncoupling of air hoses), and if there is an exposure to the hazards which the Act was designed to avoid or minimize.

Our inquiry should then turn to discover the purposes of the Act and to examine whether the existing factual circumstances involve the dangers sought to be avoided.

In *Louisville &c. Bridge Co.*, Justice Clarke stated that it is the purpose of the Act to secure the "safety of employees, of passengers and of the public. . . ." 249 U.S. 534, 538. In distinguishing between "passengers" and "the public," the Court made it clear that, as interpreted by them, the Act was designed to extend protection to more than employees and users of railroads. Viewing the general public as direct and not incidental beneficiaries of the Act's provisions, the topographical setting of the Hopewell area, especially the presence of intersecting streets and railroads, [fol. 155] comes into focus as an essential element in determining the issue whether the activities involved are "train movements."

Passing to the details of the territory through which the questioned movements were made, it should first be noted that a number of tracks of the Norfolk and Western Railway cross those of Seaboard at grade, and the Norfolk and Western, which also maintains tracks similar to Seaboard's here and which parallel Seaboard's, uses the intersecting tracks to make deliveries of cars to the various in-

dustries along the route. Moreover, according to the testimony of Mr. Roy E. Kean, Seaboard's assistant superintendent at Richmond, engines of the Norfolk and Western Railway and the Allied Chemical and Dye Company, as well as those of the defendant, operate over the defendant's tracks in the vicinity of Allied Chemical and Dye for a short distance.

In addition to private road crossings, five public streets intersect the defendant's tracks. One, known as DuPont Street, is the means of access to Allied's plant. Another, Terminal Street, is the situs of the headquarters and main fire station of the Hopewell Fire Department, which also houses automotive equipment of the Hopewell Emergency Squad. The evidence showed that vehicles of the Fire Department have occasion to use the Terminal Street intersection, although there was no direct evidence of there having been interference, by the defendant, with the passing of their vehicles. Randolph Street, also known as Virginia State Route 10, is the main automobile route between Richmond and Norfolk. It is a "heavily travelled" road, and at the point where it crosses the Seaboard tracks, there is a sharp curve which materially restricts visibility of railroad cars approaching the crossing from either direction. While it is true that the crossing is protected by manually oper-[fol. 156] ated gates, the Supreme Court in *Louisville &c. Bridge Co.* declared that the very presence of gates at street crossings "serve[s] to emphasize the dangerous character of the movement." 249 U.S. 534, 539.

Palm Street and Hopewell Street also cross the Seaboard tracks, and the latter leads to the Hercules Powder Company plant, described in the testimony as a "relatively large plant." These two intersections have been the scenes of four collisions with automobiles since 1941, and three of them involved trains not having their airbrakes in operation.

Although the Randolph Street intersection is the only one protected with more than stationary signs, as the District Judge found, traffic over the street crossings varies from moderate to heavy. The moderate traffic, which occurs at hours coinciding with the usual hours of the defendant's movements along the tracks, is by no means insubstantial.

The evidence, moreover, shows that Seaboard frequently operates its trains with a number of cars in front of the locomotive as well as behind it, thereby increasing the danger. Two of the movements in question here (counts 2 and 4) were made with 13 and 8 cars, respectively, ahead of the engine. Because the engineer's range of vision is consequently reduced, there is, in these situations, still more reason for requiring the use of airbrakes. J. R. Hoag, a retired I.C.C. inspector, who is employed by Seaboard as Safety Consultant, was sent to Hopewell to survey the area and, in a letter to Seaboard's General Superintendent, he wrote, "... in cases where any considerable number of cars, probably more than ten, are pushed ahead of the engine, then the air brakes should be coupled on those cars and a [fol. 157] tail hose provided so the trainman on the leading car can control the movement in case of emergency." He also advised that "there is no question that where air brakes are coupled and in use on a cut of cars, quicker stops can be made from any speeds."

Since it appears that an important factor in the essential nature of the work done is the potential hazard to those whom the Act is designed to protect, and since the Act has been construed as having been designed to include the general public in its protection, the sum of the elements in this case makes it more than evident that Seaboard has violated the Safety Appliance Act as to at least three of the movements in question.

The majority opinion relies on several cases which, under facts similar to those before us, held the movements only switching operations, exempt from the requirements of the Act. Notable are three cases from the Seventh Circuit. In the first of these, *United States* v. *New York, C. & St. L. Ry. Co.*, 77 F.2d 215 (1935), the Court cited *Louisville &c. Bridge Co.* v. *United States*, 249 U.S. 534 (1919), as the closest Supreme Court case, and distinguished it on its facts. The *Northern Pacific* case, 254 U.S. 251, which is indistinguishable, was apparently overlooked. Fifteen years later, however, when *United States* v. *Elgin S. & E. Ry. Co.*, 182 F.2d 1 (1950), was before that Court, *Northern Pacific* was cited to it, and the Seventh Circuit distinguished it on the basis of there having been two street crossings and five rail crossings at grade in *Northern Pacific*, whereas in

Elgin, no public streets or other railroads were crossed at grade, only two private roadways. The third case, *United States* v. *Chicago, B. & Q. R. Co.*, 199 F.2d 223 (1952), was decided two years after *Elgin*. Although in *Chicago, B. & Q.* one of the questioned movements was a two-mile [fols. 158-159] straight road which crossed two public streets at grade, and rode over a track used by two through trains passing between Eola and West Chicago, the Court nevertheless followed its decision in *Elgin* and held that it was only a switching movement. Again the indisputably contrary *Northern Pacific* case went undistinguished and unmentioned.

There is no need to labor over decisions irreconcilable with those of the Supreme Court, for it is our duty to follow the law as laid down by that body, and not the contrary holdings of other courts.

The Second Circuit, on the other hand, in *United States* v. *South Buffalo R. Co.*, 168 F.2d 948 (1948), held that the crossings of a private way in movements similar to those here was a sufficient element to render the movements those of "trains" within the meaning of the Act. Judge Augustus Hand, speaking for the Court, declared: "We think it undesirable for the courts by their decisions to enable railroads to eliminate safety appliances where hazards undoubtedly exist to some substantial degree and where the use of such appliance would insure increased protection." 168 F.2d 948, 952. The Second Circuit is, I think, in harmony with controlling authority.

I would affirm as to count 3, and reverse as to counts 1, 2 and 4.

[fol. 160] In United States Court of Appeals for the Fourth Circuit

No. 7534

United States of America, Appellant

vs.

Seaboard Air Line Railroad Company, Appellee

Judgment—Entered June 30, 1958

Appeal from the United States District Court for the Eastern District of Virginia

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

June 30, 1958.

Clement F. Haynsworth, Jr., United States Circuit Judge.

August 18, 1958, mandate issued and transmitted to Clerk of the United States District Court at Richmond, Virginia.

[fols. 161-162] SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1958

No. —

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—September 23, 1958

Upon Consideration of the application of counsel for petitioner.

It Is Ordered that the time for filing petition for writ of certiorari in the above entitled cause be, and the same is hereby, extended to and including November 28th, 1958.

Earl Warren, Chief Justice of the United States.

Dated this 23rd day of September, 1958.

[fols. 163-164] SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1958

No. 540

UNITED STATES OF AMERICA, Petitioner,

vs.

SEABOARD AIR LINE RAILROAD COMPANY

ORDER ALLOWING CERTIORARI—January 12, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Frankfurther took no part in the consideration or decision of this application.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, PETITIONER

v.

SEABOARD AIR LINE RAILROAD COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

SEABOARD AIR LINE RAILROAD COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming the judgment of the United States District Court for the Eastern District of Virginia denying recovery of statutory penalties provided by the Safety Appliance Act, 45 U. S. C. 6.

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (App., *infra*, pp. 20–41) are reported at 258 F. 2d 262.

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1958 (App., *infra*, p. 20). On September 23, 1958, Mr. Chief Justice Warren extended the time for filing a petition for a writ of certiorari to and in-

cluding November 28, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the court below employed improper standards in holding movements of transfer trains exempt, as switching operations, from safety requirements imposed by Congress on movement of "any train."

STATUTES AND ORDER INVOLVED

The Act of March 2, 1893, c. 196, 27 Stat. 531, as amended, provided:[1]

> Sec. 1 [45 U. S. C. 1] * * * [I]t shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with * * * appliances for operating the train-brake system, or to run any train in such traffic * * * that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.
>
> * * * * *
>
> Sec. 6 [45 U. S. C. 6] * * * [A]ny such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this Act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered

[1] On August 14, 1957, the statute was further amended and the penalty was increased to $250 (71 Stat. 352, 45 U. S. C. (Supp. V) 6).

in a suit or suits to be brought by the United States attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed * * *.

The Act of March 2, 1903, c. 976, 32 Stat. 943, amending the 1893 Act, provided:

> Sec. 2 [45 U. S. C. 9] * * * [W]henever, as provided in said Act [of March 2, 1893, *supra*] any train is operated with power or train brakes, not less than fifty per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said fifty per centum shall have their brakes so used and operated; and, to more fully carry into effect the objects of said Act, the Interstate Commerce Commission may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid; and failure to comply with any such requirement of the said Interstate Commerce Commission shall be subject to the like penalty as failure to comply with any requirement of this section.

The order of the Interstate Commerce Commission, dated June 6, 1910 (49 C. F. R. 1321), provided:

> On and after September 1, 1910, on all railroads used in interstate commerce, whenever, as required by the Safety Appliance Act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85 per

cent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-brake cars in every such train which are associated together with the 85 per cent shall have their brakes so used and operated.

STATEMENT

In a suit for statutory penalties filed in the United States District Court for the Eastern District of Virginia, the United States charged respondent, in four separate counts, with the operation of four trains without coupling of the air brakes, in violation of the Safety Appliance Acts (2 R. 1–6).[2] The respondent, in its answer, admitted the respective operations but contended that they were switching operations, not train movements (2 R. 7–9).

The facts may be summarized as follows:

Respondent has established in the city of Hopewell, Virginia, a yard known as its "classification or assembly yard." All trains to or from Hopewell pass through this yard for breaking up or assembly. From this classification yard, a track extends through the city of Hopewell for a distance of approximately two miles to the lead tracks of the Allied Chemical and Dye Company and Continental Can Company plants; this track running from the classification yard crosses, at grade, five streets (one of which is Virginia State Route 10), two private roads, four tracks of the Norfolk & Western Railroad, and a track for interchange

[2] The printed appendix to the government's brief below is designated "1 R.", and the supplemental appendix is designated "2 R.".

with Norfolk & Western. The track is also used by engines of Allied Chemical for short distances near the Allied Chemical plant. Nine industrial sidings or spur tracks branch off between the classification yard and Allied Chemical and Continental. After an incoming train has been broken up in the classification yards, an engine is coupled on to the cars which are to be delivered over the lead track. The cars consigned to customers of respondent Seaboard are hauled to the appropriate spur (2 R. 10–11, 15, 20–23, 44).

In September, 1951, inspectors of safety appliances for the Interstate Commerce Commission advised respondent that air brakes were required to be coupled and in operation on movements from the classification yard to the Allied Chemical and Continental plants. Thereafter, the brakes on cars engaged in such operations were coupled (2 R. 48–49). However, in January, 1956, respondent discontinued the coupling because of "the time element" that was involved, because of a 30% increase in business in the area, and because of respondent's conclusion that "there was no undue or unusual risk" (2 R. 49–51).

In March, 1956, the inspectors visited the area and observed the four admitted failures to couple brakes which gave rise to the four counts, as follows:

1. On March 5, 1956, a locomotive and 26 cars went as a single unit, without stops, from the lead tracks of the Allied Chemical plant for two miles to the classification yard (2 R. 2–3, 18–19).

2. On March 5, 1956, a locomotive and 28 cars similarly traveled two miles from the classification yard

to the lead track of the Allied Chemical plant (2 R. 4, 27).

3. On March 5, 1956, a locomotive and 29 cars were taken from a track near the Allied Chemical plant to the Norfolk & Western interchange track (which is about midway between the plant and the classification yard, App. *infra*, pp. 21–22). There, the locomotive was detached, coupled to 20 additional cars on the interchange track, and the entirety coupled to the 29 cars. The total of 49 cars was taken intact the remaining distance of approximately a mile to the classification yard (2 R. 5, 29–31).

4. On March 6, 1956, a locomotive and 23 cars went from the classification yard for two miles to the lead track of the Continental Can plant (2 R. 6, 31).

The foregoing movements were at speeds of 4 to 13 miles per hour. No cars were picked up or set out, except for the straight pickup of 20 cars noted above in the third case. No sorting, selecting, or classifying of cars occurred on the line between the classification yard and the company tracks. The crew knew the operation was to be a straight run before the train started (2 R. 19, 27–28, 30–31, 35–37).

The district court rendered judgment for the defendant, holding that only "shifting movements" were here involved (2 R. 14). The judge concluded (2 R. 14), that "no absolute standard is available for determining whether a particular movement is a train movement * * * or whether it is a shifting movement * * *. Instead, each case must be decided on its merits, giving full consideration to the purpose be-

hind the statute and its implementing regulations and all pertinent facts."

In a letter order of June 28, 1957, the judge adopted the findings submitted by respondent railroad (2 R. 15) which included the following: that respondent designated as within "yard limits" not only the classification yard but also the two miles of track to the lead tracks of the Allied Chemical and Continental plants (2 R. 10); that Norfolk & Western, on its track for interchange of cars with respondent, did not couple the brakes (2 R. 11); that Norfolk & Western tracks crossing respondent's track at grade were used "to serve industries only" and that signs on the former's tracks gave respondent's trains the right of way (2 R. 11); that street crossings were provided with warning devices to travelers on the highways and that a watchman was stationed at one street crossing (2 R. 11); that traffic over the private crossings "is generally light"; that traffic over the street crossings "varies from moderate to heavy * * * the heavy traffic occurring at hours which do not coincide with the usual hour for movements along the tracks here involved, but there are no scheduled movements" (2 R. 11–12); that there was "no evidence that the movements complained of or similar movements have at any time or in any way

[1] In a letter order of April 4, 1957, the judge had stated that "the safety record of [respondent] and the added cost of operation are not controlling", but assumed that they "are worthy of consideration" along with "other facts" (1 R. 35–36). He included, as facts which he had considered in determining whether a "train" was here involved, "the number and nature of the grade crossings" (1 R. 36–37).

interfered" with a fire department and emergency station on one of the cross streets a few hundred feet from the track (2 R. 12); that all movements within the "yard limits" are under the direction of respondent's "agent" (2 R. 12); that on the second and fourth movements some of the cars were ahead of the engine (2 R. 12, 13); that there was no perceptible grade on the track involved (2 R. 13); that respondent's rules prohibit speed in excess of that permitting a stop within half the range of vision (2 R. 13); that in the past 27 years there had been only four crossing accidents, *i. e.*, two in 1941, one in 1944, and one in 1954,* and that there had never been an injury to an employee on a movement between the classification yard and the industrial plants or spurs (2 R. 13); that for respondent to connect the air brakes on such movements "would result in a delay of approximately forty minutes on each movement and entail an additional annual expense of $30,000 for wages alone, and other expenses" (2 R. 13–14); and that the movements "would not have been less hazardous to employees or the public if air brakes had been coupled and used" (2 R. 14).

The Court of Appeals for the Fourth Circuit affirmed, Chief Judge Sobeloff dissenting. The majority opinion stated that there was no difference in the "nature of the work" between a run which worked every spur along the two-mile lead track and one which did not; that the business on the track was the distribution of cars from trains which had completed

*The accidents were collisions with automobiles. Three involving trains did not have their air brakes coupled (2 R. 47–48).

their "over-the-line run" and the assembly of cars into "outgoing" trains (App. *infra*, pp. 24–25). The court distinguished the instant operations from "movements between major terminals" (App. *infra*, p. 26), "movements * * * over main line tracks" (App. *infra*, pp. 26–27), and "line haul" (App. *infra*, p. 28). It reasoned that, under the instant circumstances, two miles was not "an unreasonable distance to travel without train brakes" (App. *infra*, p. 28).

Chief Judge Sobeloff, dissenting as to counts 1, 2 and 4, in a full survey of this Court's cases in the field, particularly alluded to the absence of stops in the movements and the consequent impropriety of judging the specific trips by the irrelevant fact that, upon other occasions, shorter runs, and truly switching operations, might emanate from the particular track (App. *infra*, pp. 30–31).

REASONS FOR GRANTING THE WRIT

The Court of Appeals for the Fourth Circuit—and, as we shall show, some other courts as well—have come to deem the applicability of the Safety Appliance Act to depend upon the judgment of the court as to whether, upon the facts before it, power brakes are socially or economically desirable in a particular operation. But neither Congress nor this Court, in its prior decisions under this Act, have left the question of the desirability of power brakes for such an amorphous and subjective determination. Congress, in the statute, requires that minimum air brake connections be coupled on "any train" (*supra*, pp. 2–3). And this Court, in the four cases in which

it dealt with the efforts of railroads to avoid this requirement (and rejected contentions similar to those accepted by the court below), laid down a clear rule that the movement of cars as a unit, without uncoupling or switching out cars, is the movement of a train (see *infra*, pp. 12–14).

The departure from this clear and simple standard has led to confusion and conflict among the courts of appeals (see *infra*, pp. 14–18), and this in turn has led to increasing failure by the railroads to observe the protective measures required by Congress. This is well illustrated by this case where the respondent, after using air brakes on the type of runs here involved for five years, decided to try to save the cost of using such brakes (*supra*, p. 5). And respondent has been sustained in this change on the basis of a host of considerations which have nothing to do with the only question which should have been at issue—whether a "train" was assembled and run as a unit separate from and beyond the assembling or switching process. Thus, the district judge entered into findings concerning other safety devices, such as crossing guards, as if these could suffice as a substitute for the air brakes that Congress required. Further, the designation of "yard limits" by the railroad was emphasized, despite the arbitrary nature of that designation and the inclusion therein of a track extending two miles from the classification yard.[5] The possible

[5] The testimony was clear that only in the "classification yard" were cars "switched and blocked according to the consignee intended." The track leading out of the classification yard, and the track for interchange with Norfolk & Western,

use of spurs from the track, on other occasions, for true switching operations was considered as affecting the movements here where no switching occurred on the two-mile run, a fact known to the crew before the cars were started on the journey.

This misreading of the statute and the decisions of this Court will inevitably result in accelerating disregard of the statutory requirement. The Interstate Commerce Commission advises us that the ruling involved in the decision below is applicable to thousands of transfer movements occurring daily on the railroads in the United States; that of recent date there has been an increasing tendency to claim that particular operations are not train movements; and that now, when larger cars and heavier loadings increase the hazard, the uncertainty as to the movements which are within the brake provision hampers effective enforcement of this important measure and jeopardizes the safety and welfare of railroad employees and the public.

1. We believe, with Chief Judge Sobeloff below (App., *infra*, pp. 29–41); that this Court has laid down a clear and simple rule that under this legislation "any train" means any movement of an assembled group of cars with an engine for an appreciable distance without coupling or uncoupling cars. The fact that at either end of the movement there has been or will be switching or assembling of cars does not convert a movement of a train of cars for a substantial distance into something other than a train movement. Even a train

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while nominally designated within "yard limits" were not within the classification yard (2 R. 45–47).

hauled across the country is assembled and disassembled at some point. The issue is whether the movement is as a train or whether switching is actually involved in the particular operation under consideration.

In *Louisville &c. Bridge Co. v. United States*, 249 U. S. 534, which involved a movement of 26 cars for ¾ of a mile by a company operating only a terminal yard, this Court pointed out the nature of the determination to be made, saying (p. 538):

> An engine and twenty-six cars, assembled and coupled together, not only satisfies the dictionary definition of a "train of cars," but would certainly be so designated by men in general and in any fair acceptation of the term must be regarded as constituting a train within the meaning of the statute. * * *
>
> The work done with the cars, as described, was not a sorting, or selecting, or classifying of them, involving coupling and uncoupling, and the movement of one or a few at a time for short distances, but was a transfer of the twenty-six cars as a unit from one terminal into that of another company for delivery, without uncoupling or switching out a single car, and it cannot, therefore, with propriety be called a switching movement.

See also *United States* v. *Erie Railroad Company*, 237 U. S. 402, and *United States* v. *Chicago, Burlington & Quincy Railroad*, 237 U. S. 410, both holding that "transfer trains", taking groups of cars "as a unit" (237 U. S. at 412) from one place of receiving, breaking up, assorting, storing and distributing, to another,

were subject to the safety requirement, since the operation was the transportation of a train of cars and not their distribution or assembly.

In the *Louisville* case, the Court rejected the very considerations considered by the court below in this case—the attempt to argue lesser dangers in short runs and within-the-yard operations, and to show economic hardship in requiring coupling of the brakes. This Court said (p. 539):

> * * * [T]he construction which the act should receive is not to be found in balancing the dangers which would result from obeying the law with those which would result from violating it, nor in considering what other precautions will equal, in the promotion of safety, those prescribed by the act. Such considerations were for Congress when enacting the law and it has repeatedly been held by this court that other provisions of the Safety Appliance Act impose upon the carrier the absolute duty of compliance in cases to which they apply and that failure to comply will not be excused by carefulness to avoid the danger which the appliances prescribed were intended to guard against, nor by the adoption of what might be considered equivalents of the requirements of the act [citing authorities].

Thereafter, in *United States* v. *Northern Pacific Railway Co.*, 254 U. S. 251, 254, a unanimous Court, in holding that the requirement was not limited to main-line runs, stated:

> It is admitted that this railroad is engaged in interstate commerce; and the cases cited show that transfer trains, like those here involved, are

> "trains" within the meaning of the act. A moving locomotive with cars attached is without the provision of the act only when it is *not* a train; as where the operation is that of switching, classifying and assembling cars within railroad yards for the purpose of making up trains. Congress has not imposed upon courts applying the act any duty to weigh the dangers incident to particular operations; and we have no occasion to consider the special dangers incident to operating trains under the conditions here presented.

The simple construction of the language "any train" to apply to a continuous movement of cars accords with the purpose of the legislation. When the cars do not yet comprise a train—*i. e.*, when they are being switched—it would not be feasible to couple and uncouple the air brake connection every time a car is added or detached. But once the cars are assembled and move as a unit they are a "train" and Congress has concluded that air brakes are necessary.[6] The requirement fixed by Congress should not be disregarded because a railroad believes, and a court agrees, that some other kind of safety measure may suffice.

2. Despite the clear and emphatic nature of the foregoing holdings of this Court, there have been continuing efforts by the railroads, with varying degrees of success in various circuits, to expand the concept of switching operations to include continuous move-

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[6] The legislative history of the legislation shows that a substantial purpose was not merely to prevent collisions but to preclude the necessity of using brakemen atop the cars to man hand-brakes (H. Rep. No. 1678, 52d Cong., 1st sess., pp. 1, 3, 4–5; S. Rep. 1049, 52d Cong., 1st sess., pp. 29–31, 109–110).

ments of cars which ultimately have some relation to switching, even though no switching operations are involved in the actual movement. Considerations which were used by this Court to give force to its ruling that brakes must be applied to "any train" movement, including transfer trains, have been lifted out of context and given independent validity as factors to be considered in determining whether the movement is as a train or a switching operation, *e. g.*, the number of crossings, the use of the main line, the other precautionary measures, etc. The result is conflict among the circuits on the test to be applied and differing results on similar sets of facts. We submit that it is necessary, if the Act is to be enforced effectively and equitably in the interest of the safety of railroad employees and the public, that the standard be clarified (or, perhaps more accurately, reaffirmed) and the conflicts resolved by this Court.

Some years ago, the government requested this Court to consider this issue in relation to the conflict posed by the decision of the Seventh Circuit in *United States* v. *Chicago, Burlington & Quincy R. R. Co.*, 199 F. 2d 223, and that of the Second Circuit in *United States* v. *South Buffalo Railway Co.*, 168 F. 2d 948, certiorari denied, 335 U. S. 870, since the courts had reached diametrically opposed results on admittedly similar facts. We pointed out in the petition for a writ of certiorari in that case (No. 550, Oct. Term, 1952) that there was an increasing tendency to apply criteria (such as the degree of danger, and the number of grade crossings) which had no re-

lation to the standards fixed by this Court, *i. e.*, whether the movement was as a unit or whether switching was actually involved. This Court at that time declined to review the Seventh Circuit's decision. 345 U. S. 908. We respectfully submit that decisions in the intervening years, and particularly the decision below, have substantially increased the necessity for review by this Court. The confusion which now prevails has, as this case illustrates, led railroads more frequently to risk continuous movements of coupled cars without air brakes if the movements can somehow be related to switching operations. And the court below has added the force of its authority to that of the Seventh Circuit in permitting a departure from the standards fixed by this Court almost forty years ago.

The conflict among the courts of appeals has also become more pronounced. We think that the decision below is in conflict with that of the Eighth Circuit in *United States* v. *Thompson*, 252 F. 2d 6, holding that air brakes should have been used where nineteen cars were transferred from a yard to a plant about three miles distant, the cars were set out at the plant, and 25 cars were picked up and brought back to a yard. While it is true that in that case about a mile and a quarter of the three mile run was over main-line tracks, that factor is not controlling since this Court specifically held in *United States* v. *Northern Pacific Railway Co.*, 254 U. S. 251, that the Act applied whether or not a main line was used. The Eighth Circuit said in the *Thompson* case (252 F. 2d at p. 9):

> It is our understanding that when cars are assembled at one point in a railroad terminal and moved intact a considerable distance for delivery at another point in the same terminal, the movement is not a switching operation but is, as a matter of law, a train movement, and particularly so when main line tracks are used or crossed.

This is obviously a different standard from that applied by the court below and by the Seventh Circuit in the *Chicago, Burlington* case, *supra*.[7]

It is also different from the test applied by the Fifth Circuit in *United States* v. *Panhandle & Santa Fe Ry. Co.*, 203 F. 2d 241, 246. Although the decision in that case was favorable to the government on the particular facts involved, it does illustrate how far the courts are tending to depart from the simple criteria laid down by the decisions of this Court and properly recognized by the Eighth Circuit in the *Thompson* case. The Fifth Circuit said (203 F. 2d at p. 246):

> It is clear that since the statute involved provides no specific definition of a train, the Courts are required to consider and determine each case upon its own facts. * * * In testing the matter of compliance with the statute, the question is whether the facts show a train movement. In making this determination, the decisions, to some of which we have referred,

[7] In the Seventh Circuit, the government challenged a district court holding exempting transfer trains as switching operations. *United States* v. *Terminal R. R. Assoc.*, No. 12347. On November 19, 1958 the Court of Appeals affirmed. See Appendix B, *infra*, p. 42.

> usually consider, among other matters, the similarity of the movement in question to the usual line haul, the distance involved, the possibility of contact or hazard with other trains, and the evidenced statutory intention to attain safety of operation for other trains and railroad employees. The extent or presence of these features in the movement in question are compared and contrasted with the operations of switching, classifying and assembling cars within railroad yards for the purpose of making up a train and the resulting determination is dependent upon within which of these classifications the Court is convinced the operation in question falls. Possibility of injury to vehicular traffic and pedestrians upon street grade crossings has been also weighed in determining whether the statute has been violated, but the validity of this feature as a controlling element is subject to question, especially unless it be borne in mind that absence of street crossings upon the route of a movement of locomotive and cars is only evidentiary upon the case as a whole and does not alone change a train movement to a switching operation.

We have referred only to these recent cases and not to the older decisions which they cite because the later cases show the present difficulties which confront both the Interstate Commerce Commission and the railroads. The Safety Appliance Act is now being so differently interpreted in the various circuits that neither the Interstate Commerce Commission nor the railroads have any clear guide as to whether a mass of operations properly fall within the statute. A simple statutory requirement has become a com-

plex economic and sociological problem with the outcome unpredictable even within a single circuit because of the many factors often weighed. We urge this Court to resolve that conflict and reaffirm the clear, simple standard it initially recognized Congress has fixed.

CONCLUSION

There is conflict and confusion among the courts of appeal as to the criteria to be applied in determining what constitutes a train movement for the purposes of the Safety Appliance Act. We think this conflict and confusion has arisen because of misconception of, and failure to apply, the standard laid down by Congress and recognized by this Court nearly forty years ago. It is therefore respectfully submitted that this Court should grant the petition for a writ of certiorari.

J. Lee Rankin,
Solicitor General.
Malcolm Anderson,
Assistant Attorney General.
Beatrice Rosenberg,
J. F. Bishop,
Attorneys.

November 1958.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7534

UNITED STATES OF AMERICA, APPELLANT,

v.

SEABOARD AIR LINE RAILROAD COMPANY, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT RICHMOND

(Argued March 6, 1958. Decided June 30, 1958.)

Before SOBELOFF and HAYNSWORTH, Circuit Judges, and WILLIAMS, District Judge.

Edwin J. Slipek, Assistant United States Attorney, (L. S. Parsons, Jr., United States Attorney, and Henry L. Hilzinger, Attorney, Interstate Commerce Commission, on brief) for Appellant, and Lewis Thomas Booker and Eppa Hunton, IV (Hunton, Williams, Gay, Moore & Powell on brief) for Appellee.

HAYNSWORTH, Circuit Judge:

This is a proceeding under § 6 of the Safety Appliance Act (45 U. S. C. A. § 6) to collect the statutory

penalties for violations of the Act. The violations are said to have occurred when, on four occasions, the railroad moved cars without coupling their brakes so that they could be operated by the engineer. It is admitted that, in each instance, the only operable brakes were those upon the engine, so the only issue is whether or not the movements were train movements within the contemplation of the Act (45 U. S. C. A. § 9) and the supplementary orders of the Commission.

In distinguishing between "train movements," in which the brakes of the cars must be coupled and operable, and switching movements, in which they need not be, courts have considered so many circumstances as affecting the character of the movement that we should first refer to the trackage and operations of the Seaboard in Hopewell, Virginia, where the movements occurred.

Hopewell, Virginia, is served by a branch line of the Seaboard which connects with the main line at Bellwood and terminates at Hopewell. Incoming trains from Bellwood arrive at a classification yard where they are broken up and from which the cars are distributed to consignees in Hopewell. Much of the distribution is effected over a lead track, which winds through the industrial section of Hopewell for a total distance of approximately two miles. Nine spurs, springing from the lead track, serve industrial customers whose plants are adjacent to them, and some of them are used for car storage. The spur, or customer lead, track most distant from the classification yard serves a plant of Continental Can Co., while the one second in distance from the classification yard serves a plant of the Allied Chemical & Dye Co. A track for the interchange of traffic with the Norfolk and Western also springs from the lead track at a

point approximately midway between the classification yard and the end of the lead at Continental Can Co.

The Norfolk and Western has lead tracks paralleling the Seaboard lead throughout most of the length of the latter, and several of the Norfolk and Western industrial spurs cross the Seaboard lead track. At such crossings, the Seaboard has the right of way, and Norfolk and Western crews must bring their engines to a complete stop before crossing the Seaboard lead track. The leads of both railroads cross several streets and private ways. The crossing of one of these streets, a state highway carrying a substantial amount of traffic, is protected by a watchman and manually operated gates. The crossings of other streets and ways are protected only by stationary signs.

There is no perceptible grade on the Seaboard lead, and all movements over it are at yard speeds and under yard control. It is a part of the Hopewell Yard, and serves no purpose other than the distribution of cars from inbound trains broken up in the classification yard and the assembly of cars to be made up, in the classification yard, into outbound trains.

When an incoming train has been broken up in the classification yard, a switch engine couples on to those cars which are to be delivered over the lead track. Acting under orders of the local freight agent, the switching crew proceeds to distribute the cars over the lead track. Those consigned to customers on Seaboard spurs are spotted on the appropriate spur, while those destined to points on the Norfolk and Western are placed upon the interchange track. Because of the specialized needs for different types of cars,[1] the crew may be required, en route, to pick up

[1] Most of the material delivered to Allied Chemical & Dye, for instance, is in coal hopper cars and boxcars, but most of its product is shipped out in tank cars.

of other railroads, one of which carried passenger trains; and that, for a distance of about one mile, two other railroad companies, "under the usual traffic-right agreements," also used the D. T. Tracks for delivering cars to consignees. Although, at two intermediate points along the D. T. Tracks there were 9 and 6 tracks, respectively, where cars were frequently set out or picked up by the transfer trains, the Court noted that the two movements in question were accomplished without stops. The fact that on other occasions the locality was used for switching operations was not permitted to outweigh the fact that at the times under inquiry, no stops were made to switch cars. In our case, not only were there no such stops but, as before mentioned, three of the runs were begun with the fore-knowledge that no stopping or switching would be required.

In answer to the argument that the trains were not operated on a main line, Justice Brandeis stated that if use of a main line were essential, the requirement would be satisfied by the presence of other freight trains, quoting the language of Justice Van Devanter in the *Chi., Burl. & Q. R. R.* case that the defendant's trains and those of other railroads "which the statute was equally designed to protect," "were exposed to the hazards which that provision was intended to avoid or minimize." 254 U. S. 254. "But," continued Justice Brandeis, "there is nothing in the Act which limits the application of the provision here in question to operations on main line tracks." Thus he made it plain that even if there had been no other trains using the tracks, the legal result would have been the same.

The inescapable rationale of the four Supreme Court cases, as developed and refined in the *Northern Pacific Ry. Co.* case, is that transfer movements, even of the nature shown here (to and from industrial and

cars from storage tracks and place them upon other spurs for loading. On the return trip,[2] the switching crews pick up from the spurs loaded outbound cars and empty cars for which the customer has no need, and, from the interchange track, cars which had been placed there by the Norfolk and Western for delivery to the Seaboard. These cars are then distributed to storage tracks breaking from the lead track or to the classification yard as circumstances may require.[3] Outbound cars are then made up in the classification yard into an outbound train.

No question has been raised about any movement in either direction over the lead track during which the crew worked a spur relatively near the classification yard. It is asserted, however, that an isolated movement in either direction becomes a train movement if only the more distant spurs are worked. Thus, the charges here are based upon two movements from the classification yard to the Continental Can lead track without intermediate stops and upon two movements from the Allied Chemical lead track to the classification yard during at least one of which there was an intermediate stop en route to pick up additional cars from the interchange track.[4]

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[2] It is possible that the operation in the two directions may overlap to some extent. If cars are to be delivered to a spur and other cars picked up from the same spur, it may be that both operations would be performed at the same time, but the record before us does not disclose the practice here.

[3] On one of the movements toward the classification yard, the engine left the Allied Chemical lead track with twenty-nine loaded cars, stopped at the interchange track to pick up six loaded and fourteen empty cars and arrived at the classification yard with forty-nine cars. On the other questioned movement in that direction, records of the railroad indicate the engine left the Allied Chemical lead track with four loaded and one empty car, stopped at the interchange track to pick up one loaded and twenty empty cars and arrived at the classification yard

The fact that less than all of the nine spurs may be worked during a particular movement has no controlling significance. Nor do we believe the answer is to be found in an identification of the spurs actually worked. The nature of the work, its purpose and character are precisely the same, whether every other spur is to be worked, only those between the classification yard and the interchange track or only those, or one of them, between the interchange track and the end of the lead track. Whether these spurs are to be worked or those, the business of the switch engine and its crew here is the distribution of cars from trains which have completed their over-the-line run and the collection and assembly of cars to be made up into outgoing trains.

Nor do we accept the Government's contention that "since the defendant moved (cars) between designated points in its yard for a distance of about 2 miles without picking up or setting out any car en route," the movement must necessarily have been a train movement requiring operable train brakes. Substantially every switching operation involves such movements, many for comparable distances, but they take on the appearance of train movements only when lifted from their context of switching operations and separated from their function and purpose. It is not enough, ignoring what transpires before and what follows, to say that cars were moved from this point to that; the character of the operation is to be determined by

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with twenty six cars, but an inspector for the Commission had testified that all twenty-six cars were moved from the Allied Chemical lead track without a stop at the interchange track.

The two movements from the classification yard to the Continental Can lead track were of twenty-eight and twenty-three cars, respectively. In each of these movements, some of the cars were ahead of the engine and others were behind it.

a look at the whole and with due regard to all elements of its setting.

Thus viewed, we agree with the District Court that these movements were properly classified as switching movements. In the average day there were ten of such movements, and they do not fall into separate categories solely upon the basis of a classification, in terms of relative distance from the classification yard, of the spurs worked. The lead track, the spurs that break from it and the classification yard are all parts of one yard, and its extremities are not so distant as to deprive a movement from one end of the yard to the other of the flavor of its function in breaking up and making up trains.

Unlike other sections of the Safety Appliance Act which apply to the use or haulage of a locomotive or a car, the train brake provisions apply only to the running of trains. The difference in language is an appropriate expression of Congressional intention, in the adoption of the train brake provisions, to distinguish between an over-the-line run, during which the need of useful train brakes was great and obvious and compliance with the requirement would not unduly hinder railroad transportation, and switching operations, during which there is little or no need for train brakes and general and strict compliance with the requirement would be impossible or highly impractical. The distinction was pointed out by the Supreme Court in the first case involving the train brake provisions to come before it. *United States* v. *Erie Railroad Company*, 237 U. S. 402, 35 S. Ct. 621, 59 L. Ed. 1019, and, a week later, the Supreme Court declared the controlling test to be "the essential nature of the work done." *United States* v. *Chicago, Burlington & Quincy Railroad Company*, 237 U. S. 410, 35 S. Ct. 634, 59 L. Ed. 1023.

But movements of trains and cars are so varied that the distinction between the fast, through train and the simplest switching operation is not always easily applied. Functionally, a transfer movement between separated yards may be a switching operation, but, particularly if it moves over main line tracks, it has elements of similarity to movements between major terminals and many of the underlying reasons for the train brake requirement are present. Train brakes are usually required in such movements. *United States* v. *Erie Railroad Company*, 237 F. S. 402, 35 S. Ct. 621, 59 L. Ed. 1019; *United States* v. *Chicago, Burlington & Quincy Railroad Company*, 237 U. S. 410, 35 S. Ct. 634, 59 L. Ed. 1023; *Louisville and Jeffersonville Bridge Co.* v. *United States*, 249 U. S. 534, 39 S. Ct. 355, 63 L. Ed. 757; *United States* v. *Northern Pacific Railway Company*, 254 U. S. 251, 41 S. Ct. 101, 65 L. Ed. 249; *Chesapeake & O. Ry. Co.* v. *United States*, 4 Cir. 226 F. 683; *Illinois Central R. Co.* v. *United States*, 8 Cir., 14 F. 2d 747; *Chicago & E. R. Co.* v. *United States*, 7 Cir., 22 F. 2d 729; *United States* v. *Southern Pacific Co.*, 9 Cir., 60 F. 2d 864; *United States* v. *Southern Pacific Co.*, 9 Cir., 100 F. 2d 984. Movements for the distribution and collection of cars have been held subject to the train brake provisions when conducted over main line tracks. *United States* v. *Panhandle & Santa Fe Ry. Co.*, 5 Cir., 203 F. 2d 241; *United States* v. *Thompson, Trustee*, 8 Cir., 252 F. 2d 6, but similar movements over yard tracks have generally been held to be exempt switching operations. *United States* v. *Great Northern Ry. Co.*, 9 Cir., 73 F. 2d 736; *United States* v. *New York, C. & St. L. Ry. Co.*, 7 Cir., 77 F. 2d 215; *United States* v. *Elgin, J. & E. Ry. Co.*, 7 Cir., 182 F 2d 1; *United States* v. *Chicago, Burlington & Quincy R. Co.*, 7 Cir.,

199 F. 2d 223; *United States* v. *Pennsylvania Railroad Co.*, D. C., Md., 80 F. Supp. 965; *United States* v. *Great Northern Ry. Co.*, W. D., Wis., 103 F. Supp. 889; *United States* v. *Staten Island Rapid Transit Railway Company*, E. D., N. Y., 151 F. Supp. 911. Cf. *United States* v. *South Buffalo R. Co.*, 2 Cir., 168 F. 2d 948. Even though the movements with which he was concerned were over main line tracks, Judge Hutcheson, now Chief Judge of the Court of Appeals for the Fifth Circuit, held that the train brake requirements were inapplicable because of the short distances between the spurs to be worked. *United States* v. *Texas & N. O. R. Co.*, S. D., Texas, 13 F. 2d 429.

The movements here were not over main line tracks, nor even inter-yard connecting tracks. They moved, entirely within the confines of one yard, over a lead track only two miles long from which there sprang nine spurs and an interchange track. Since the nature of the work was clearly the distribution and collection of cars following the breakup of trains and preparatory to the make-up of others, we are convinced they were switching operations, exempt from the requirement of train brakes.

The classification of cars, narrowly considered, is but one of several exempt switching activities. Spotting cars upon a team track alongside classification tracks is equally exempt. Delivering cars to spurs is no less typical of switching than classification, and the considerations which exclude the one from the train brake requirement are applicable to the other. Movements over the lead track, from one spur requiring attention to the next, are an inseparable part of the switching activity, when the lead track is used, in fact, as an integral part of a yard in which the cars have been received or from which they are to

be dispatched. Nor can we say, having due regard for the nature of the track, its connections and its use, that two miles is an unreasonable distance to travel without train brakes, when the "nature of the work done" is so clearly switching.

Much of the emphasis in the submission of the case has been upon the crossings of streets and of spurs of the Norfolk and Western, the Government pointing to them as potential hazards, while the railroad advances its safety record under the precautions of yard rules and asserts that the use of train brakes will increase, rather than minimize the risk of injury to trainmen, for they will be required to pass between the cars to couple the hose. Consideration of such crossings of streets and tracks is not irrelevant, for they are a part of the physical setting in which the movement must be viewed in order to determine its nature and character. A switching operation does not cease to be a switching operation, however, merely because the movement crosses a highway or spur track. Many an industrial spur crosses a public or private way, but spotting a car on such a spur does not become a line haul on that account. Movements over or across main line tracks may stand upon a different basis, where the switching movement becomes a potential hazard in the operation of main-line trains, but crossing other yard tracks is a common incident in switching and their ownership by another railroad is not a significant circumstance.

It is not contended here that the Act properly or rationally may be construed to require the use of train brakes on every switching movement which crosses streets or highways or the yard tracks of another railroad. On the contrary, it is conceded that movements over these same crossings are exempt from the re-

quirement if shifting is done relatively near the classification yard, a circumstance having no relation to the suggested hazard of the crossings. Whether or not a car has been placed upon a particular spur, the risk of collision with vehicular traffic at Randolph Street, and the other crossings, is precisely the same.

Where Congress has commanded the use of train brakes, the courts cannot excuse a failure to use them because of the use of other devices and measures, however effective in assuring safety they may be. If it were accepted that the Act should be construed to require train brakes whenever their use would contribute substantially to the safety of operations, an appraisal of the effectiveness of other measures would be necessary to decision, but it is not even contended that the Act has any such meaning.

Equally irrelevant, if Congress has required the use of air brakes, is consideration of the substantial cost to be imposed upon the railroad and of delay in the handling of freight. But if the use of train brakes on these movements is costly, delays shipments and creates new risks of injury without substantially contributing to the alleviation of existing risks, it is a reminder that courts should not extend the requirement beyond the intention of the Congress or needlessly chip away major portions of the long established exemption of switching operations.

Affirmed.

SOBELOFF, Circuit Judge, concurring in part and dissenting in part:

After four and one-half years of operating its railroad cars between the Hopewell classification yard and the plants of the Continental Can Company and Allied Chemical & Dye Company in compliance with the airbrake provisions of the Safety Appliance Act (45 U. S. C. A., Sec. 9), the defendant, in March,

1956, ceased using airbrakes. I cannot agree that the change in practice was legally justified, and after consideration of the very persuasive majority opinion, I am nevertheless constrained to dissent from the holding that none of the four movements in question constitutes a "train" movement within the meaning of the Act. As to three of them at least, those in which there was no picking up or shunting of cars en route,[1] the Act seems clearly applicable.

The facts of the case have been painstakingly stated and, with few exceptions, require no amplification. These exceptions are, however, crucial. It should be mentioned as more than coincidence that three of the four movements were accomplished without stops en route. The defendant's own evidence is that Seaboard's agent at Hopewell, Mr. Morrison, customarily receives lists from the various industrial plants along the line, informing him of the cars to be picked up by Seaboard. The "yard people" are then issued instructions as to the cars to be moved to and from the plants. Therefore, as to the first movement in question (count number 1), when Seaboard's crew coupled together an engine and 26 cars at the Allied Chemical and Dye Company plant on March 5, 1956, it was known to them that they would proceed, nonstop, for a distance of two miles, and, in the second movement on that day (count number 2) and the one in question which occurred the next day (count number 4), 28 and 23 cars, respectively, were assembled for uninterrupted two-mile runs from the Hopewell classification yard to the Allied Chemical and Dye

[1] Although there was a conflict in the evidence whether one or two of the movements were interrupted by switching operations en route, the District Judge resolved the conflict by finding a stop for switching in only one of the four, the one alleged as the third violation.

Company and the Continental Can Company's plants. Except for their role in the topographical setting, therefore, the presence of a number of other closely-spaced industrial spurs which may, at different times, be worked is irrelevant to this case. The fact that, on other occasions, frequent stopping and shifting of cars might make the process of coupling and uncoupling airbrakes utterly impractical, is equally unimportant so far as the movements here involved are concerned. This feature of the case should not be ignored.

The question, then, is whether a train, to be subject to the Act, may consist of a locomotive and 23 or more cars which have been either assembled from incoming trains or picked up at one location, and which are to proceed, nonstop, for a distance of approximately two miles, where, at their destination, they are either unloaded or reassembled into outgoing trains.

In terms, the Act requires airbrakes to be used on "all trains * * * used on any railroad." As my colleagues have observed, however, the Supreme Court, in a series of four cases, drew a distinction between "train" and "switching" operations, ruling that the airbrake requirement was inapplicable to the latter, and declaring the test to be "the essential nature of the work done."

The character and extent of the "switching" exemption, and the relative weight due the various criteria in the application of the "essential nature" test, can best be ascertained by examining and appraising the various contexts in which they were judicially created and authoritatively applied. Resort to the Supreme Court cases, in some detail, becomes necessary.

The first was *United States* v. *Erie R. R.*, 237 U. S. 402, decided by a unanimous Court in 1915. The

defendant railroad operated a freight yard at Bergen, New Jersey, where regular eastbound freight trains were stopped and broken up and regular westbound freight trains made up and started. Following the break-up of the eastbound trains, and before the assembly of westbound trains, temporary groupings of cars, known as "transfer trains," were made up and moved to and from two other freight yards. The first, the Jersey City yard, was located two miles from Bergen, and the other, the Weehawken yard, three and one-half miles from Bergen. The trains ran only between these yards, usually had about twenty-five cars, carried no caboose, were operated by crews and engines specially engaged in that service, and at irregular intervals under the orders of yardmasters, at speeds of seven to eighteen miles per hour. Without using the requisite number of airbrakes, nine transfer trains were hauled from Jersey City to Bergen, six from Bergen to Weehawken, two from Weehawken to Bergen, and one from Bergen to Jersey City. These operations, similar to the ones in question here, were held to be train operations within the meaning of the Safety Appliance Act.

It is, of course, arguable that a distinction exists between the work done in *Erie* and the instant case, in that the cars here were being hauled to and from their ultimate consignees, whereas in the *Erie* case, the cars received by the Jersey City and Weehawken yards were then to be delivered further to their industrial and commercial consignees. Such a distinction, if suggested, would not be a valid one, and the *Erie* opinion itself refutes it. In summing up the decision in *Erie*, the Court, through Mr. Justice Van Devanter, said: "We, therefore, conclude and hold that it [the airbrake provision of the Safety Appliance Act] embraced these transfer trains. Its ap-

plicability to this class of trains was considered and sustained in * * * *United States* v. *Pere Marquette Railroad*, 211 Fed. Rep. 220 [D. Ct. W. D. Mich., 1913]. * * *" The approval and adoption by the Supreme Court of the decision in *Pere Marquette* is significant, because the District Court held in that case that the transfer of a string of 17 cars, assembled from incoming trains which had been broken up, for a distance of two miles within the general yard limits of the City of Grand Rapids, the cars to be unloaded at their destination, constituted a "train" movement within the meaning of the Safety Appliance Act. Thus, as early as the *Erie* case, it was decided that a "transfer train" may consist of a string of cars hauled a short distance for unloading as well as further forwarding.

A week after its decision in *Erie*, the Supreme Court rendered its decision in the second of the pertinent cases, *United States* v. *Chi., Burl. & Q. R. R.*, 237 U. S. 410 (1915). Again dealing with transfer trains hauled for a short distance (2 miles), this time around Kansas City, Missouri, the Court concludes that the trains in question were "exposed to the hazards" which the airbrake provision "was intended to avoid or minimize," and the movements were held to be train movements. P. 412. The railroad argued that the work of moving the transfer trains was being done by switching crews, and in answer to this contention, the Court formulated what has become known as the "essential nature" test: "Neither is it material that the men in charge were designated as yard or switching crews, for the controlling test of the statute's application lies in the essential nature of the work done rather than in the names applied against it." P. 413.

In the third of the Supreme Court decisions, *Louisville &c. Bridge Co.* v. *United States*, 249 U. S. 534 (1918), moving, for a distance of three-quarters of a mile, a string of 26 cars which had been assembled for delivery to another railroad, was held to be a train movement. Mr. Justice Clarke, writing for the Court, stated: "An engine and twenty-six cars, assembled and coupled together, not only satisfies the dictionary definition of a 'train' of cars, but would certainly be so designated by men in general and in any fair acceptation of the term must be regarded as constituting a train within the meaning of the statute." P. 538. Discounting the argument that the work done was merely part of a switching operation, Justice Clarke pointed out that the features considered generally as constituting exempt switching movements, were not present: "The work done with the cars, as described, was not a sorting, or selecting, or classifying of them, involving coupling and uncoupling, and the movement of one or a few at a time for short distances, but was a transfer of the twenty-six cars as a unit from one terminal into that of another company for delivery, without uncoupling or switching out a single car, and it cannot, therefore, with propriety be called a switching movement." P. 538.

Finally, in *United States* v. *Northern Pac. Ry. Co.*, 254 U. S. 251 (1920), the Supreme Court was presented with a fact situation almost identical to the one in question here, and again without dissent, the Court held that the movements involved constituted train movements. The history of the *Northern Pac.* case is interesting for two reasons. First, the facts are more fully developed in the Court of Appeals opinion and, second, the Court of Appeals, which was reversed, took the same approach to the case I have my colleagues here.

South of the main tracks at Duluth, Minnesota, were several tracks known as the "Duluth Terminal" or "D. T. Tracks." They were operated as a single yard, and no part of them was ever used by any trains running between stations, freight or passenger, but, as in our case, they were used "exclusively * * * to supply the industries along these tracks with loaded cars or empties to be loaded for outgoing freight, for deliver[y] to the main line." 244 F. 655, 657, 658. The trains were not operated according to fixed schedules, but were moved under the yardmaster's orders at such speeds that they could be stopped at vision. Two strings of freight cars, consisting of 40 and 48 cars, respectively, were run along this line for a distance of approximately 4 miles at speeds varying between three and eighteen m. p. h. The Court of Appeals for the Eighth Circuit thought the earlier Supreme Court cases distinguishable in that the movements involved in those cases were along main line tracks and not devoted exclusively to the servicing of local industries. Affirming a directed verdict for the defendant railroad, the Eighth Circuit held: "From these facts no other conclusion can be reached than that of the learned trial judge, that these train movements were mere switching operations, and therefore not within the airbrake provision of the Act of Congress, as determined in the *Erie* and *Chicago, Burlington & Quincy Railroad* cases, *supra*." 255 F. 655, 658.

The Supreme Court, in an opinion by Justice Brandeis, disagreed. It held that the movements along the D. T. Tracks in the Duluth area were movements of transfer trains within the doctrine of the three prior cases, and were not switching operations exempt from the Act. The Supreme Court found it "material" that the tracks crossed two streets at grade; five tracks

commercial consignees), and even on tracks specially used for that purpose, are train movements subject to the airbrake provisions of the Act if they are not accompanied by the picking up and delivery of cars en route (which would necessitate the frequent coupling and uncoupling of air hoses), and if there is an exposure to the hazards which the Act was designed to avoid or minimize.

Our inquiry should then turn to discover the purposes of the Act and to examine whether the existing factual circumstances involve the dangers sought to be avoided.

In *Louisville &c. Bridge Co.*, Justice Clarke stated that it is the purpose of the Act to secure the "safety of employees, of passengers and of the public. * * *" 249 U. S. 534, 538. In distinguishing between "passengers" and "the public," the Court made it clear that, as interpreted by them, the Act was designed to extend protection to more than employees and users of railroads. Viewing the general public as direct and not incidental beneficiaries of the Act's provisions, the topographical setting of the Hopewell area, especially the presence of intersecting streets and railroads, comes into focus as an essential element in determining the issue whether the activities involved are "train movements."

Passing to the details of the territory through which the questioned movements were made, it should first be noted that a number of tracks of the Norfolk and Western Railway cross those of Seaboard at grade, and the Norfolk and Western, which also maintains tracks similar to Seaboard's here and which parallel Seaboard's, uses the intersecting tracks to make deliveries of cars to the various industries along the route. Moreover, according to the testimony of Mr. Roy E. Kean, Seaboard's assistant superintend-

ent at Richmond, engines of the Norfolk and Western Railway and the Allied Chemical and Dye Company, as well as those of the defendant, operate over the defendant's tracks in the vicinity of Allied Chemical and Dye for a short distance.

In addition to private road crossings, five public streets intersect the defendant's tracks. One, known as DuPont Street, is the means of access to Allied's plant. Another, Terminal Street, is the situs of the headquarters and main fire station of the Hopewell Fire Department, which also houses automotive equipment of the Hopewell Emergency Squad. The evidence showed that vehicles of the Fire Department have occasion to use the Terminal Street intersection, although there was no direct evidence of there having been interference, by the defendant, with the passing of their vehicles. Randolph Street, also known as Virginia State Route 10, is the main automobile route between Richmond and Norfolk. It is a "heavily travelled" road, and at the point where it crosses the Seaboard tracks, there is a sharp curve which materially restricts visibility of railroad cars approaching the crossing from either direction. While it is true that the crossing is protected by manually operated gates, the Supreme Court in *Louisville &c. Bridge Co.* declared that the very presence of gates at street crossings "serve[s] to emphasize the dangerous character of the movement." 249 U. S. 534, 539.

Palm Street and Hopewell Street also cross the Seaboard tracks, and the latter leads to the Hercules Powder Company plant, described in the testimony as a "relatively large plant." These two intersections have been the scenes of four collisions with automobiles since 1941, and three of them involved trains not having their airbrakes in operation.

Although the Randolph Street intersection is the only one protected with more than stationary signs, as the District Judge found, traffic over the street crossings varies from moderate to heavy. The moderate traffic, which occurs at hours coinciding with the usual hours of the defendant's movements along the tracks, is by no means insubstantial.

The evidence, moreover, shows that Seaboard frequently operates its trains with a number of cars in front of the locomotive as well as behind it, thereby increasing the danger. Two of the movements in question here (counts 2 and 4) were made with 13 and 8 cars, respectively, ahead of the engine. Because the engineer's range of vision is consequently reduced, there is, in these situations, still more reason for requiring the use of airbrakes. J. R. Hoag, a retired I. C. C. inspector, who is employed by Seaboard as Safety Consultant, was sent to Hopewell to survey the area and, in a letter to Seaboard's General Superintendent, he wrote, "* * * in cases where any considerable number of cars, probably more than ten, are pushed ahead of the engine, then the air brakes should be coupled on those cars and a tail hose provided so the trainman on the leading car can control the movement in case of emergency." He also advised that "there is no question that where air brakes are coupled and in use on a cut of cars, quicker stops can be made from any speeds."

Since it appears that an important factor in the essential nature of the work done is the potential hazard to those whom the Act is designed to protect, and since the Act has been construed as having been designed to include the general public in its protection, the sum of the elements in this case makes it more than evident that Seaboard has violated the

Safety Appliance Act as to at least three of the movements in question.

The majority opinion relies on several cases which, under facts similar to those before us, held the movements only switching operations, exempt from the requirements of the Act. Notable are three cases from the Seventh Circuit. In the first of these, *United States* v. *New York, C. & St. L. Ry. Co.*, 77 F. 2d 215 (1935), the Court cited *Louisville &c. Bridge Co.* v. *United States*, 249 U. S. 534 (1919), as the closest Supreme Court case, and distinguished it on its facts. The *Northern Pacific* case, 254 U. S. 251, which is indistinguishable, was apparently overlooked. Fifteen years later, however, when *United States* v. *Elgin S. & E. Ry. Co.*, 182 F. 2d 1 (1950), was before that Court, *Northern Pacific* was cited to it, and the Seventh Circuit distinguished it on the basis of there having been two street crossings and five rail crossings at grade in *Northern Pacific*, whereas in *Elgin*, no public streets or other railroads were crossed at grade, only two private roadways. The third case, *United States* v. *Chicago, B. & Q. R. Co.*, 199 F. 2d 223 (1952), was decided two years after *Elgin*. Although in *Chicago, B. & Q.* one of the questioned movements was a two-mile straight run which crossed two public streets at grade, and rode over a track used by two through trains passing between Eola and West Chicago, the Court nevertheless followed its decision in *Elgin* and held that it was only a switching movement. Again the indisputably contrary *Northern Pacific* case went undistinguished and unmentioned.

"There is no need to labor over decisions irreconcilable with those of the Supreme Court, for it is our duty to follow the law as laid down by that body, and not the contrary holdings of other courts."

The Second Circuit, on the other hand, in *United States* v. *South Buffalo R. Co.*, 168 F. 2d 948 (1948),

held that the crossings of a private way in movements similar to those here was a sufficient element to render the movements those of "trains" within the meaning of the Act. Judge Augustus Hand, speaking for the Court, declared: "We think it undesirable for the courts by their decisions to enable railroads to eliminate safety appliances where hazards undoubtedly exist to some substantial degree and where the use of such appliance would insure increased protection." 168 F. 2d 948, 952. The Second Circuit is, I think, in harmony with controlling authority.

I would affirm as to count 3, and reverse as to counts 1, 2 and 4.

JUDGMENT

Filed and Entered June 30, 1958

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7531

UNITED STATES OF AMERICA, APPELLANT

v.

SEABOARD AIR LINE RAILROAD COMPANY, APPELLEE

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

June 30, 1958.

CLEMENT F. HAYNSWORTH, JR.,
United States Circuit Judge.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 12317

September Term and Session, 1958

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, DEFENDANT-APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ILLINOIS

November 19, 1958

Before DUFFY, *Chief Judge*, and FINNEGAN and KNOCH, *Circuit Judges*.

DUFFY, *Chief Judge*. Two civil suits containing six causes of action were brought against defendant to recover penalties for alleged violations of the Safety Appliance Acts, Title 45 U. S. C., Secs. 1–16, and an order of the Interstate Commerce Commission issued pursuant thereto. At issue on this appeal are the two causes of action in Civil No. 3473 and the first two causes of action in No. 3202. These four involve an interpretation of section 9, the Air Brake Provisions of the Statute.

Section 9 of the Act provides that when any train is operated with power or train brakes not less than

fifty percentum of these cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and provides that the stated minimum percentage may be increased by order of the Interstate Commerce Commission. Such an order was issued in June, 1910, increasing the percentage to 85%.

There is no dispute that defendant did not have the required percentage of air brakes in use and operation on the movements hereinafter described. The sole question is whether the movements complained of were those of "trains." The District Court found and determined that the movements were switching operations, hence the statute had not been violated.

None of the movements in this case involves the use of main line tracks. All of the movements were under the direct control of the Assistant General Yardmaster who had radio contact with all engines operated on the tracks in question. The work was accomplished by switching crews with the use of a switch engine.

The first movement complained of is No. 3202 originated in defendant's Yard No. 2, where the crew reported for work and were assigned their engine. This crew assembled cars from the No. 2 yard which were destined for No. 5 yard and for various industries to be served by that crew on that day. They proceeded to Yard No. 5 where they cut out cars which were to remain at Yard 5, and added cars destined for the industries to be serviced by the crew such as American Zinc Co., Darling & Co., Monsanto, etc. The movement of the engine and 27 cars proceeded southward along what is known as the conlogue track to a point where the conlogue is intersected by tracks of the G M & O Railway and by the Southern Railway. The distance to this point from No. 5 yard is less than 1,000 feet. The movement stopped in obedience to a

stop board and the operating rules of defendant. The crew checked the crossing visually and reported to the engineer that the way was clear. There were no obstructions to a clear view in any direction.

The G M & O Railway and the Southern Railway have operating rules which require all movements across this crossing to make a positive stop. Furthermore, the tracks of the Southern Railway come to a dead end approximately 1,650 feet west of their crossing with the conlogue.

The movement proceeded from the crossing to a point just south of Monsanto Avenue where the movement was stopped and twelve cars were left on the south bound conlogue, and the movement proceeded to No. 2 siding where six more cars were set off, and the movement then proceeded to the siding of Darling & Company. At no time did this movement exceed ten miles per hour. The total distance of the movement was approximately 1¾ miles.

The movement set forth in the second cause of No. 3202 and the first cause of No. 3173 were identical except for the number of cars; there were 25 cars in the first instance and 37 cars in the second. Starting in Yard 5, the cars were drawn by a switch engine along the southward conlogue across the tracks of the G M & O Railway and Southern Railway as hereinbefore described. The movement proceeded to the south leg of the wye, then backed 2,500 feet along the south leg of this wye and across State Highway 3, a heavily travelled highway, and then on to side tracks leading to several industrial concerns. The total distance of the movement in each case was about 1¾ miles. No cars were picked up or set out enroute. The speed was not in excess of six miles per hour and when crossing Highway 3, was reduced to three miles per hour.

The movement set forth in the second cause of No. 3473 was made in the reverse direction to those of the second cause of No. 3202 and the first cause of No. 3473. It consisted of 18 cars starting from a back track near the Monsanto plant, and proceeding to Yard No. 2. The total distance of this movement was approximately 2¾ miles. No cars were picked up or set out en route. The speed of the movement did not exceed 6 miles per hour and was reduced to 3 miles per hour when crossing Highway 3. Protection at the Highway 3 crossing at the time of the movements here in question was provided by automatic flashing lights and a bell. More recently, automatic gates were installed.

A moving locomotive with cars attached is within the provision of the Act only when it is a "train. There is no definition of "train" in the Safety Appliance Act. However, it has been held that where the operation is that of switching, classifying and assembling cars within railroad yards for the purpose of making up a train, the movement is not a train. *United States* v. *Northern Pacific Railway Company*, 254 U. S. 251.

The courts have been unable to give a definite all-embracing definition of "train" within the meaning of the Act. We noted in *United States* v. *CB&QR Co.*, 199 F. 2d 223, 226: "After wrestling with it for some fifty years, courts have accomplished little other than to decide on the particular facts of the case whether the movement was that of a train within the meaning of the Act. * * *"

The most recent decisions of this Court upon the subject here under consideration are *United States* v. *CB&QR Co.*, 199 F. 2d 223, and *United States* v. *EJ&ERR Co.*, 182 F. 2d 3. In many respects the conditions surrounding the area where the movements

of engines and cars occurred in those cases were similar to the conditions existing in the case at bar. In each of the cited cases we held the movements were switching operations and that section 9 of the Act did not apply. Although previous court decisions in this field may not be as binding as precedents in other areas of the law, we believe in the interest of consistency that the same results should be reached if the surrounding conditions are similar.

The learned trial judge gave careful consideration to the opinions of this Court just cited as well as to numerous other opinions touching the question to be decided. The trial court reached the conclusion that the four movements in the case at bar were switching operations. We think a correct conclusion was reached. The decision of the District Court is

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

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Supreme Court of the United States

October Term, 1958

No. 10

UNITED STATES OF AMERICA,
Petitioner

v.

SEABOARD AIR LINE RAILROAD COMPANY,
Respondent

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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Supreme Court of the United States

October Term, 1958

No. 540

UNITED STATES OF AMERICA,

Petitioner

v.

SEABOARD AIR LINE RAILROAD COMPANY,

Respondent

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

STATEMENT OF THE CASE

This action began when Petitioner brought a civil suit in the United States District Court for the Eastern District of Virginia against Respondent to collect the statutory forfeiture for Respondent's failure to use connected air brakes in its Hopewell, Virginia, yard operations on four different occasions on March 5 and 6, 1956. This failure was said to violate Section 2 of the Act of March 2, 1903 (45 U. S. C. 9). After a hearing on the merits without a jury, the District Court dismissed the suit and entered final judgment for Respondent on July 3, 1957. Petitioner appealed to the United States Court of Appeals for the Fourth Circuit. That Court affirmed the District Court, Chief

Judge Sobeloff dissenting in part, on June 30, 1958. Petitioner seeks a writ of certiorari from this Court to review the decision of the Court of Appeals for the Fourth Circuit.

QUESTION PRESENTED

Should this court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit holding that the railroad operations complained of were not "train" movements?

STATEMENT OF FACTS

Petitioner's statement of facts, while accurate as far as it goes, omits certain other facts which should be considered by this Court before ruling on the request for a writ. The printed appendix to Respondent's brief below, nine copies of which were filed by Petitioner with its petition, will be referred to as "D. R."

Hopewell, Virginia, is at the end of a spur line running from Bellwood, near Richmond, on Seaboard's main line of railroad. The Seaboard tracks do not run beyond Hopewell. No passenger trains run between Bellwood and Hopewell. Trains from Bellwood terminate at the Hopewell classification yard where they are broken up. From there the cars are switched by switch engines and switching crews to the various industries in Hopewell, and only switching operations take place within the Hopewell yard limits (D. R. 13).

At the same time an Interstate Commerce Commission inspector noted these violations he noted several other similar movements in Respondent's Hopewell Yard. He made no report of them because he thought the ones noted would be easier to prove, since they were longer movements than the others, even though the function of the movements was the same (D. R. 9, 12). Tracks of the Norfolk & Western

Railway immediately parallel Respondent's tracks, and movements on them are made without air brakes. However, the inspector reported no violations by the Norfolk & Western (D. R. 4, 27).

ARGUMENT

I.

The Previous Decisions of This Court as to When the Air Brake Provisions of the Safety Appliance Act Apply Are Clear and Do Not Need To Be Restated.

Petitioner argues in its brief that it is necessary for this Court to grant a writ of certiorari to review this case, because conflict and confusion exists among the circuits, and the Safety Appliance Act is not being properly applied. Whether this conflict is more imagined than real will be explored later. Respondent submits that the decisions of this Court are explicit and free from ambiguity and that if any difficulty in their application exists it is because the factual situation differs from case to case and not because of any want of clarity in the decisions themselves.

The applicable sections of the Safety Appliance Act as supplemented by the I. C. C. order of June 6, 1910, are set out in full in the Government's petition and need not be repeated here.

The question presented may be simply stated, "What is a train?" Neither the Act nor the I. C. C. order defines what a train is in the context of the statute. This Court, however, in two cases decided over forty years ago has very clearly defined a train within the meaning of the Act and the order.

In *United States* v. *Erie R. R. Co.*, 237 U. S. 402 (1915), this Court considered the application of this portion of the Safety Appliance Act for the first time. The defendant had

argued that certain movements between one place of break up or assembly of its trains and another similar place in the New York harbor area were not trains within the meaning of the Act so as to require their air brakes to be connected. This Court defined a train in this context and pointed out the circumstances under which the Act would not apply, at pp. 407-8:

> "It will be perceived that the air-brake provision deals with running a train, while the other requirements relate to hauling or using a car. In one a train is the unit and in the other a car. As the context shows, a train in the sense intended consists of an engine and cars which have been assembled and coupled together for a run or trip along the road. When a train is thus made up and is proceeding on its journey it is within the operation of the air-brake provision. *But it is otherwise with the various movements in railroad yards whereby cars are assembled and coupled into outgoing trains and whereby incoming trains which have completed their run are broken up. These are not train movements but mere switching operations and so are not within the air-brake provision . . .*" (Emphasis supplied)

This language is certainly clear. Engines and cars coupled for a run along the road are subject to the Act; movements within a yard where trains are broken up and switched after the completion of their road run are not subject to the Act.

United States v. *Chicago, Burlington & Quincy R. Co.*, 237 U. S. 410 (1915), was decided just a week after the *Erie* case, *supra*. The *Erie* case recognizes that there are movements of railroad cars which are not subject to the air-brake provisions of the Safety Appliance Act. The *Burlington* case carries the distinction one step further and poses the test which the courts must apply in determining in which

of the categories described by the *Erie* case a particular movement falls.

The test is found at p. 413:

> ". . . Neither is it material that the men in charge were designated as yard or switching crews, for *the controlling test of the statute's application lies in the essential nature of the work done* rather than in the names applied to those engaged in it." (Emphasis supplied)

How could this Court put it more clearly and succinctly? If the essential nature of the work done is switching, then the Act does not apply. If the essential nature of the work done is a road movement, or a transfer movement of cars from one terminal or yard to another, as in *Louisville & Jeffersonville Bridge Company* v. *United States*, 249 U. S. 534 (1919), then the Act does apply and the air-brakes must be connected. The *Erie* points up the distinction between switching movements which fall outside the Act and other movements; the *Burlington* case supplies the test to determine whether a given movement is a switching movement or not.

The court below in this case specifically applied the "nature of the work done" test. The majority said, *United States* v. *Seaboard Air Line Railroad Company*, 258 F. 2d 262 (1958), at pp. 266, 267:

> "The classification of cars, narrowly considered, is but one of several exempt switching activities. Spotting cars upon a team track alongside classification tracks is equally exempt. *Delivering cars to spurs is no less typical of switching than classification, and the considerations which exclude the one from the train brake requirements are applicable to the other.* Movements over the lead track, from one spur requiring

> attention to the next, are an inseparable part of the switching activity, when the lead track is used, in fact, as an integral part of a yard in which the cars have been received or from which they are to be dispatched. Nor can we say, having due regard for the nature of the track, its connections and its use, that two miles is an unreasonable distance to travel without train brakes, *when the 'nature of the work done' is so clearly switching.*" (Emphasis supplied)

Of course there will be times when the "nature of the work done" test will be difficult to apply to a given movement because of the variety of train movements. The court below recognized this at p. 206 of its opinion when it pointed out:

> "But movements of trains and cars are so varied that the distinction between the fast, through train and the simplest switching operation are not always easily applied. . . ."

In other words, the courts find that the test is clear enough; the source of difficulty is not in the test itself but in the many different factual situations to which the test must be applied. Because the test is clear, Respondent submits that this Court should deny the petition for a writ of certiorari. It will serve no useful purpose for this Court to restate what is already perfectly clear.

II.

Asserted Conflicts in the Circuits Do Not Warrant the Granting of a Writ of Certiorari in This Case

This Court last term granted writs of certiorari in two cases involving the Federal False Claims Act, *United States v. Mc Ninch*, 355 U. S. 808 (1957), and *Rainwater v.*

United States, 355 U. S. 811 (1957). In the *McNinch* case, the Court of Appeals for the Fourth Circuit had held that a false claim submitted to the Commodity Credit Corporation was not a claim against the government within the meaning of the False Claims Act. In the *Kaiser* case, the Court of Appeals for the Eighth Circuit had held that a false claim submitted to the Commodity Credit Corporation did fall within the Act. This Court granted the petitions for certiorari and upheld the Eighth Circuit and reversed the Fourth Circuit, *Kaiser* v. *United States*, 356 U. S. 390 (1958); *United States* v. *McNinch*, 356 U. S. 595 (1958).

This is a typical example of the purpose for which this Court's jurisdiction to review cases by writ of certiorari is intended. In those cases two circuits had reached directly conflicting results on the identical question of law, *i. e.*, whether a claim against the Commodity Credit Corporation falls within the False Claims Act.

Here there is no such conflict between the circuits. If one circuit were to decide that the essential nature test of the *Burlington* case should be abandoned and another circuit were to disagree, then a classic example of a conflict warranting the granting of a writ would be presented.

The circuits agree on what the test is and how it should be applied, and the asserted conflicts occur because of the difficulty of applying the test to the many varied situations which per force must arise in an industry where geography, terrain, local industries, and a host of other factors determine the locale and operations of a railroad yard and necessitate its being somewhat dissimilar to every other railroad yard.

It is also suggested that the decision below is in conflict with this Court's decision in *United States* v. *Northern Pacific Railway Company*, 254 U. S. 251 (1920), and that

this furnishes even more reason for granting a writ. In the *Northern Pacific* case this Court specifically found, at p. 253:

> ". . . These four miles of railroad [the tracks over which the movements in controversy occurred] owned by the Northern Pacific *are not used by it for switching or assembling cars.* The switching, assembling and classification of cars for its through and local freight is done in the Rice's Point yard where there are fifty-five tracks. . . ." (Emphasis added.)

But in the instant case the evidence is clear that the tracks in question were used solely for switching operations. Both the District Court and the Court of Appeals so found. Thus, not only is this case distinguishable from the *Northern Pacific* case, the *Northern Pacific* case falls in an entirely different category—a transfer movement between two terminals or yards in which the assembly or break up is performed.

Petitioner also contends at p. 11 of its brief that a writ should be granted because the Interstate Commerce Commission has advised that the decision below hampers effective enforcement of an important safety measure. It is striking that the Government fails to divulge the source of, or quote, this "advice" which it claims to have received from the I. C. C. Is it not because it knows that on the record no other conclusion could have been reached by the District Court and the Court of Appeals that the Government finds it necessary to rely on alleged "advice" from the I. C. C. which was not offered in evidence and would have been so clearly inadmissible?

In the past ten years seven cases involving this provision in the Safety Appliance Act have reached the various Courts of Appeal. Petitioner asserts that these cases are in such hopeless conflict that this Court should grant a writ of

certiorari to reconcile them. Respondent submits that the decisions are not in conflict but are all properly decided in view of the vastly differing factual situations presented.

This Court denied petitions for a writ of certiorari in two of these cases, *United States* v. *South Buffalo R. Co.*, 168 F. 2d 948 (1948), *cert. den.* 335 U. S. 870 (1948), and *United States* v. *Chicago, Burlington & Quincy R. Co.*, 199 F. 2d 223 (7th Cir. 1952), *cert. den.* 345 U. S. 908 (1953). In the *South Buffalo* case the Government prevailed, while in the *Burlington* case the railroad prevailed. Although the two cases reached different results on somewhat similar facts, this Court apparently felt that they were both correctly decided and presented no conflict between the circuits. By the same token the present case presents no conflict between the circuits.

The United States prevailed in three of these seven cases decided in the past ten years. In *United States* v. *Thompson*, 252 F. 2d 6 (8th Cir. 1958), cars were moved intact for three miles. One mile and a quarter of this movement was over main line tracks. The Eighth Circuit held that these movements were transfer movements and not switching movements, saying, at p. 9:

> "It is our understanding that when cars are assembled at one point in a railroad terminal and moved intact a considerable distance for delivery at another point in the same terminal, the movement is not a switching operation but is, as a matter of law, a train movement, and particularly so when main line tracks are used or crossed."

This language indicates that the *Thompson* case is distinguishable on its facts from the instant case. The *Thompson* case merely affirms what this Court said in the *Louisville*

Jeffersonville case, *supra*: a transfer movement, transferring cars intact between two terminals, requires the use of air brakes, especially where main line tracks are used.

There are no main line tracks in Hopewell except that leading into the classification yard from Bellwood. None of the movements in question used any part of this track. The movements in Hopewell switch cars to the various industrial spurs from the classification yard or switch them from the industrial spurs to the classification yard for assembly into trains. These movements certainly are not the transfer of cars between two terminals over main line tracks as in the *Thompson* case. They are switching movements, and the courts below properly held that air brakes need not be applied.

In *United States* v. *Panhandle & Santa Fe Ry. Co.*, 203 F. 2d 241 (5th Cir. 1953), again there were movements from one yard to another intact over main line tracks within defendant's Amarillo Yards, similar to the *Thompson* case, but totally dissimilar to this one. *United States* v. *South Buffalo R. Co.*, 168 F. 2d 948 (2d Cir. 1948), is the only one of these three cases which has any degree of factual similarity to the case at bar. In the *South Buffalo* case cars were transferred intact from one point to another about two miles away where they were broken up for further disposition. The Second Circuit, after admitting that it was a very close case, considered this movement to be a transfer movement requiring air brakes.

But the *South Buffalo* case never mentioned, much less relied on, what this Court said in the *Burlington* case was the test—the essential nature of the work done. Furthermore, neither of the two Court of Appeals cases decided in the Government's favor since the *South Buffalo* decision was handed down relied on that opinion to support its decision.

The *Pachuta* case does not even mention the *South Buffalo* case, and *Thompson* merely lists it with a series of others to be compared.

The failure of the *South Buffalo* case to look to the nature of the work done—the test laid out so long ago—has not gone unnoticed by other courts when called on to decide cases arising under the Acts. Its gratuitous abandonment of this essential test prevents it from being a precedent of any value. It is significant to note that in the six other circuit court cases decided in the past decade none have relied on the *South Buffalo* case as a basis for decision, not even the two cases finding for the Government. The decision is without honor even in its own circuit; in *United States* v. *Staten Island Rapid Transit Ry. Co.*, 151 F. Supp. 911 (D.C., E.D.N.Y. 1957), the District Court, after stating that the case before it was factually similar to the *South Buffalo* case, went on to hold that the movements it was considering did not require air brakes.

The four cases decided in the Courts of Appeal in the last ten years in which the railroads have prevailed consist of the present case and three cases in the Seventh Circuit. The most recent decision is *United States* v. *Terminal Railroad Association of St. Louis* decided by the Seventh Circuit on November 19, 1958, and reprinted in the Government's petition at p. 12. The movements there, from 1¾ to 2¼ miles in length, were quite similar to those in the present case. They were to industrial concerns served by defendant from its yards or the reverse. The court found that these were switching movements, just as the courts below found in this case.

United States v. *Chicago, Burlington & Quincy R. Co.*, 199 F. 2d 223 (7th Cir. 1952), *cert. den.* 345 U. S. 908 (1953); involved movements approximately two miles in

length which never came on main line tracks, just as in the instant case. The court held that these movements were switching movements.

The case most similar to Respondent's case is *United States* v. *Elgin, Joliet & Eastern Ry. Co.*, 182 F. 2d 1 (7th Cir. 1950). The railroad there maintained a yard in Gary, Indiana, principally to serve two large industries adjacent to the yard just as the Hopewell yard is maintained to serve industries there. Switching movements in the Gary yard were about the same distance as here, from the yard to the industries. The Seventh Circuit held that the essential nature of the work done in that yard was switching, and no air brakes were required.

Looking at these seven cases, asserted by the Government to be in such hopeless turmoil that a writ must be granted to straighten them out, it can be seen that in fact they follow two logical lines laid out by this Court. Those finding for the railroads, on the facts before them, are cases where the nature of the work done is switching. Those finding for the United States have looked at the nature of the work done and have found that the work done is transferring cars from one point to another rather than switching them. The distinction between switching cars and transferring cars was made by this Court nearly forty years ago and is a logical distinction which can be, and is, applied by the lower courts without need for any additional clarification from this Court.

The law as laid down by this Court is clear and is correctly applied by the lower courts. Any apparent confusion which exists can be seen on closer inspection to be the result of different factual situations and not different views of the law.

III.

Factual Variances in Air Brake Cases Diminish Their Precedental Value

Cases which will have great precedental value and which will settle points of law likely to arise quite frequently are worthy of careful consideration. We submit that this has been done by this Court in the four cases decided by it forty years ago. Because these air brake cases are all necessarily different factually by the very nature of the railroad industry, one case has little value as a precedent for others. The difficulty lies in applying the law as enacted by the Congress and clearly interpreted by this Court. In this case, the trial court and the Court of Appeals have correctly interpreted the law. The trial court's findings of facts when sitting without a jury may not be set aside unless clearly erroneous, and the evidence in this case amply shows they are without error. Rule 52(a), Federal Rules of Civil Procedure, *United States* v. *Yellow Cab Co.*, 338 U. S. 338 (1949). There is, therefore, no occasion for a review by this Court.

That other cases have but slight value as precedents in these cases because of the widely varying facts has been recognized by the courts. In *United States* v. *Panhandle & Santa Fe Ry. Co.*, 203 F. 2d 241 (5th Cir. 1953), the court said, at p. 246:

> "It is clear that since the statute involved provides no specific definition of a train, the courts are required to consider and determine each case upon its own facts. Consequently, it is a rare instance where precedents are of any clear and controlling effectiveness. . . ."

In the opinion in *United States* v. *Terminal Railroad Association of St. Louis*, decided by the Seventh Circuit on

November 19, 1958, and reprinted in Petitioner's brief at pp. 42-46, the court says, at p. 46:

> ". . . Although previous court decisions in this field may not be as binding as precedents in other areas of the law, we believe in the interest of consistency that the same results should be reached if the surrounding conditions are similar."

Each case must be decided on the facts presented in that particular case. As the Seventh Circuit said in *United States* v. *Chicago, Burlington & Quincy R. Co.*, 199 F. 2d 223 (1952), *cert. den.* 345 U. S. 908, at p. 226:

> "Neither Congress nor the Interstate Commerce Commission has seen fit to define the meaning of the word 'train' as employed in the Act. This perplexing problem unfortunately, so we think, has been left to the courts. After wrestling with it for some fifty years, courts have accomplished little other than to decide on the particular facts of the case whether the movement was that of a train within the meaning of the Act. *It is apparent, therefore, that a holding in one case carries little weight as a rule for decision in another.* Even when the facts of the case are disclosed, the question must depend largely upon the opinion or judgment of the court called upon to make a decision. And where the facts bring the case within the twilight zone, as we think they do in the cases before us, the opinion of one judge or court is likely to be as good as that of another." (Emphasis supplied)

The tests laid out in the *Erie*, *Burlington* and *Louisville & Jeffersonville* cases, *supra*, are just as clear as it is possible for words to make them. This particular field of law simply happens to be one where infinite variations in factual

situations of necessity occur. Since this is so, no one case can possibly be on "all fours" with any other.

CONCLUSION

Respondent urges the Court to consider the Government's petition carefully but then deny the writ because:

1. The tests as to when a given movement falls within the Safety Appliance Act and requires air brakes were laid down in four cases decided by this Court almost forty years ago. These tests are plain and clear and have served as satisfactory guides to lower courts for this whole period. This Court apparently agrees that the language of its prior decisions is clear and that the lower courts are properly applying the law, for it has denied writs of certiorari to review these cases ever since 1920, five times since then and twice in the past ten years.*

2. The asserted conflict between the circuits does not in fact exist. No conflicts have arisen on the interpretation of the Act; the factual situations vary from case to case to such an extent that the ultimate results will necessarily vary from case to case also. This, however, certainly does not give rise to a conflict between the circuits which this Court is called on to resolve by exercise of its certiorari discretion.

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* *Illinois Central Railway Co.* v. *United States*, 14 F. 2d 747 (8th Cir. 1926), *cert. den.* 273 U. S. 752 (1927); *United States* v. *Great Northern Railway Co.*, 73 F. 2d 730 (9th Cir. 1934), *cert. den.* 295 U. S. 752 (1935); *United States* v. *Southern Pacific Co.*, 100 F. 2d 984 (9th Cir. 1939), *cert. den.* 307 U. S. 633 (1939); *United States* v. *South Buffalo R. Co.*, 168 F. 2d 948 (2d Cir. 1948), *cert. den.* 335 U. S. 870 (1948); and *United States* v. *Chicago, Burlington & Quincy R. Co.*, 199 F. 2d 223 (7th Cir. 1952), *cert. den.* 345 U. S. 908 (1953).

QUESTION PRESENTED

Whether the provision of the Safety Appliance Act requiring power brakes on "trains" covers movements of units of an engine and twenty cars or more for uninterrupted distances of from one to two miles from a classification yard to industrial plants, and pickups from such plants for return to the yard.

STATUTES AND ORDER INVOLVED

The Act of March 2, 1893, c. 196, 27 Stat. 531, as amended, provided:[1]

> SEC. 1 [45 U.S.C. 1] * * * [I]t shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with * * * appliances for operating the train-brake system, or to run any train in such traffic * * * that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.
>
> * * * * *
>
> SEC. 6 [45 U.S.C. 6] * * * [A]ny such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this Act, shall be liable to a penalty of one hundred dollars for

[1] On August 14, 1957, the statute was further amended and the penalty was increased to $250 (71 Stat. 352, 45 U.S.C. (Supp. V) 6).

3. The very nature of the railroad industry is such that no two yards are completely alike; for this reason the precedental value of each case is extremely limited, and the courts will still continue to have to decide each case on a case by case basis. This Court should not consider a case which can have little as value as a precedent as this one.

Therefore, Respondent respectfully requests that this Court deny the petition for a writ of certiorari.

SEABOARD AIR LINE RAILROAD COMPANY

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> each and every such violation, to be recovered in a suit or suits to be brought by the United States attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed * * *: *Provided*, That nothing in this Act contained shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs.

The Act of March 2, 1903, c. 976, 32 Stat. 943, amending the 1893 Act, provided:

> SEC. 2 [45 U.S.C. 9] * * * [W]henever, as provided in said Act [of March 2, 1893, *supra*] any train is operated with power or train brakes, not less than fifty per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said fifty per centum shall have their brakes so used and operated; and, to more fully carry into effect the objects of said Act, the Interstate Commerce Commission may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid; and failure to comply with any such requirement of the said Interstate Commerce Commission shall be subject to the like penalty

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No. 10

In the Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, PETITIONER

v.

SEABOARD AIR LINE RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
MALCOLM R. WILKEY,
Assistant Attorney General,
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"varies from moderate to heavy * * * the heavy traffic occurring at hours which do not coincide with the usual hour for movements along the tracks here involved, but there are no scheduled movements" (R. 10); that there was no evidence that the movements complained of or similar movements have interfered with a fire department and emergency station on one of the cross streets a few hundred feet from the track (R. 10–11); that all movements within the "yard limits" are under the direction of respondent's "agent" (R. 11); that on the second and fourth movements some of the cars were ahead of the engine (R. 11); that there was no perceptible grade on the track involved (R. 11); that the respondent's rules prohibit speed in excess of that permitting a stop within half the range of vision (R. 11–12); that in the past 27 years there had been only four crossing accidents, *i.e.*, two in 1941, one in 1944, and one in 1954,[4] and that there had never been an injury to an employee on a movement between the classification yard and the industrial plants or spurs (R. 12); that for the respond-

In the letter order of April 4, 1957, the judge had stated that "the safety record of [respondent] and the added cost of operation are not controlling", but assumed that they "are worthy of consideration" along with "other facts" (R. 7). He included, as facts which he had considered in determining whether a "train" was here involved, "the number and nature of the grade crossings," and "the physical aspect of the yard and the operations" (R. 8).

[4] The accidents were collisions with automobiles. Three of the accidents involved trains that did not have their air brakes coupled (R. 39).

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Argument—Continued

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enact the legislation. Considerations which had been used by this Court to illustrate or to give force to the broad congressional standard that power brakes must be operated on "any train" have been lifted out of context and given improper status as criteria of what is a "train," *e.g.*, the number and nature of grade crossings, the use of the "main" line, substituted precautions, etc. Under this indefinite and subjective approach, the district court below noted, decisions have been rendered on the particular facts of [each] case," "a holding in one case carries little weight as a rule for a decision in another," and "the opinion of one judge or court is likely to be as good as that of another" (*infra*, p. 43). This is not a proper application of the four decisions in which this Court laid down a clear and precise construction of Congress' use of the term "train" as any movement of an assembled unit of engine and cars for an appreciable distance without coupling or uncoupling. If the railroads believe such a broad requirement to be unnecessary as a matter of safety, or economically unsound, the contention is one to be addressed to the Congress. Until Congress changes this law, on the books for over half a century, the courts should not do so.

II

The essential error in the majority decision below is in its persistent departure from the question of what is a "train" and the consideration, instead, of questions of safety which were for the Congress alone to appraise.

A. The respondent's operations did not consist of switching. They involved runs of trains in no instance

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 10

UNITED STATES OF AMERICA, PETITIONER

v.

SEABOARD AIR LINE RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (R. 64–81) are reported at 258 F. 2d 262.

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1958 (R. 82). On September 23, 1958, Mr. Chief Justice Warren extended the time for filing a petition for a writ of certiorari to and including November 28, 1958 (R. 83). The petition was filed on November 26, 1958, and was granted on January 12, 1959 (R. 83). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

as failure to comply with any requirement of this section.

The order of the Interstate Commerce Commission, dated June 6, 1910 (49 C.F.R. 132.1), provided:

> On and after September 1, 1910, on all railroads used in interstate commerce, whenever, as required by the Safety Appliance Act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85 per cent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-brake cars in every such train which are associated together with the 85 per cent shall have their brakes so used and operated.

STATEMENT

In a suit for statutory penalties filed in the United States District Court for the Eastern District of Virginia, the United States charged the respondent, in four separate counts, with the operation of four trains without coupling the power brakes, in violation of the Safety Appliance Act (R. 1–5). The respondent, in its answer, admitted the respective operations but contended that they were switching operations, not train movements (R. 5–6).

The facts may be summarized as follows:

The respondent has established in the city of Hopewell, Virginia, a yard known as its "classification or assembly yard." Trains to or from Hopewell use this yard for breaking up or assembly. A track extends through the city of Hopewell for a distance of approximately two miles, from this classification yard

to the tracks of the Allied Chemical and Dye Company and Continental Can Company plants, making, en route, an interchange connection with the Norfolk & Western, and crossing, at grade, five streets (one of which is Virginia State Route 10), two private roads, and four tracks of the Norfolk & Western Railroad. The track is also used by engines of Allied Chemical for short distances near the Allied Chemical plant. Nine industrial sidings or spur tracks branch off between the classification yard and the Allied Chemical and Continental plants. After an incoming train has been broken up in the classification yards, an engine is coupled to the cars which are to be delivered and the cars consigned to customers of Seaboard are hauled along the two-mile track to the appropriate spur (R. 9–10).

In September, 1951, inspectors of safety appliances for the Interstate Commerce Commission advised the respondent that air brakes were required to be coupled and in operation on movements from the classification yard to the Allied Chemical and Continental plants. Thereafter, the brakes on cars engaged in such operations were coupled (R. 50). However, in January, 1956, the respondent discontinued the coupling because of "the time element" that was involved, because of a 30 per cent increase in business in the area, and because of the respondent's conclusion that "there was no undue or unusual risk" (R. 54–55).

In March, 1956, the inspectors visited the area and observed the four admitted failures to couple brakes which gave rise to the four counts, as follows:

1. On March 5, 1956, a locomotive and 26 cars went as a single unit, without stops, from the track of the Allied Chemical plant two miles to the classification yard (R. 2, 5, 11, 15, 17–18).

2. On March 5, 1956, a locomotive and 28 cars went as a single unit, without stops, from the classification yard two miles to the track of the Allied Chemical plant (R. 2–3, 5, 11, 15, 23–24).

3. On March 5, 1956, a locomotive and 29 cars went as a single unit, without stops, from a track near the Allied Chemical plant to the Norfolk & Western interchange track, which is about midway between the plant and the classification yard. There, the locomotive was detached, coupled to 20 additional cars on the interchange track, and then recoupled to the 29 cars. The total of 49 cars was taken intact, without stops, the distance of approximately a mile to the classification yard (R. 3, 5–6, 11, 15, 25–26).[2]

4. On March 6, 1956, a locomotive and 23 cars went as a single unit, without stops, from the classification yard for two miles to the track of the Continental Can plant (R. 4, 6, 11, 15, 26–27).

The foregoing movements were at speeds of 4 to 13 miles per hour (R. 11, 18, 24, 26–27). No cars were picked up or set out, except for the single pickup of 20 cars noted above in the third case; no sorting, selecting, or classifying of cars occurred on the line

[2] The court finding placed the interchange track at "approximately half way" between the plant and the classification yard (R. 11). Inspector Meyrick testified "approximately midway * * * closer to Hopewell yard" (R. 26). Inspector Roy testified to the shorter distance of 2087 feet from the interchange to the classification yard (R. 42, 44).

between the classification yard and the tracks (R. 11, 17, 24–27). The crews knew that the operations were to be uninterrupted runs before the trains started (R. 49, 59).

The district court rendered judgment for the defendant, holding that only "shifting movements" were here involved (R. 12, 14). The judge concluded that "[n]o absolute standard is available for determining whether a particular movement is a train movement * * * or whether it is a shifting movement * * *. Instead, each case must be decided on its merits, giving full consideration to the purpose behind the statute and its implementing regulations and all pertinent facts" (R. 12).

In a letter order of June 28, 1957, the judge adopted the findings submitted by the respondent railroad (R. 13), which included the following: that the respondent designated as within "yard limits" not only the classification yard but also the two miles of track through Hopewell between the classification yard and the tracks of the Allied Chemical and Continental plants (R. 9); that Norfolk & Western, on the track used for interchange of cars with the respondent, did not couple the brakes (R. 10); that Norfolk & Western tracks crossing respondent's track at grade were used "to serve industries only" and that signs on the former's tracks gave the respondent's trains the right of way (R. 10); that street crossings were provided with warning devices to travelers on the highways and that a watchman was stationed at one street crossing (R. 10); that traffic over the private crossings "is generally light"; that traffic over the street crossings

ent to connect the air brakes on such movements "would result in a delay of approximately forty minutes in each movement and entail an additional annual expense of $30,000 for wages alone, and other expenses" (R. 12); and that the movements "would not have been less hazardous to employees or the public if air brakes had been coupled and used" (R. 12).

The Court of Appeals for the Fourth Circuit affirmed, Chief Judge Sobeloff dissenting. The majority opinion stated that there was no difference in the "nature of the work" between a run which worked every spur along the two-mile lead track and one which did not; that the business on the track was the "distribution" of cars from trains which had completed their "over-the-line run" and the assembly of cars into "outgoing" trains (R. 67–68). The court distinguished the operations involved here from "the fast, through train" and "movements between major terminals", "movements * * * over main line tracks" (R. 68–69), and "line haul" (R. 70). It reasoned that, under the circumstances, two miles was not "an unreasonable distance to travel without train brakes" (R. 70).

Chief Judge Sobeloff, dissenting as to counts 1, 2 and 4 on the basis of a full survey of this Court's decisions in the field, particularly alluded to the absence of stops in the movements and the consequent impropriety of judging the specific trips by the fact that, upon other occasions, shorter runs and true switching operations might occur on the particular track (R. 72–73).

SUMMARY OF ARGUMENT

I

The Safety Appliance Act requires power brakes in operation on "any train." The respondent's failure to have power brakes in operation on four completely assembled trains, consisting of engines and 26, 28, 29, and 23 cars, respectively, in unbroken runs of two miles in three cases, and over a mile in the fourth, was a violation of the statute since, as held in the four decisions on the subject by this Court, the term "any train" includes any movement of an assembled group of cars with an engine for an appreciable distance without coupling or uncoupling cars.

A. The statute applies to "any train." When Congress chose to make an exception, it did so in specific language in the case of logging trains and trains of four-wheel cars, and it did not leave it to the courts to determine that they were not "trains" merely because considerations of danger and expense might be thought to justify exceptions. Notably absent from the statutory language is any exception for "switching." Obviously, in a true switching operation of an engine shunting one car or a few cars for short distances, involving coupling and uncoupling, there is no running of a "train." There is, however, no statutory exemption of "switching operations" or "shifting operations" as such, much less any further exemption of any run of an assembled train that can be related to "switching" because the run was preceded or followed by switching—as all runs must be—or because the train runs over trackage used *at other times* by

other, unassembled units for the brief, limited, operations of actual switching.

B. The primary purpose of the legislation was to end deaths and injuries of train employees, which had occurred in the years preceding 1893 by reason of falls from cars by men required to go atop those cars to operate the handbrakes. The danger was intended to be substantially eliminated by progressively increasing the percentage of cars having power brakes operated by the engineers. The power-brake requirement was intended also to reduce the danger to other employees from the stopping of a train containing substantial numbers of unbraked cars, since these cars jolted forward through the slack in a chain-reaction of increasingly violent impacts which threw men from the cars.

The peculiar dangers to employees sought to be mitigated by use of power brakes are as great whether a train is run to a terminal or to an industrial plant. The legislative history negates any intent to restrict the application of the Act to the "main" line or to "road" haul. The hearings disclose that use of the word "line" did not mean "main" line, for handling of trains in yards was also contemplated. Moreover, freight trains were more the subject of safety needs than passenger trains (as to which more care was already being taken), and freight trains typically would be employed in various runs to such destinations as industrial plants off the "main" lines.

C. This Court, in its four decisions on the subject, specifically held so-called "transfer" trains to be sub-

ject to the power-brake requirements, and rejected efforts of the railroads to base exceptions on the absence of danger in particular operations or locales. The decisions arose out of efforts of the railroads to narrow the concept of a "train" by expanding the government's own recognition that an engine engaged in actual switching of one or a few cars was not a "train." The railroads, ignoring the fact that the distinction lay in the smallness and short-lived nature of an actual small switching operation, sought to exclude virtually anything that could remotely be related to switching.

1. This Court, in the first two cases, *United States* v. *Erie R.R. Co.*, 237 U.S. 402, and *United States* v. *Chicago, Burlington & Quincy R.R.*, 237 U.S. 410, rejected contentions that runs of assembled units of engines and cars were not covered by the safety requirements for "trains," when the runs were between yards at which the trains had been or would be assembled or broken up. Also rejected were contentions that designations of separated areas as a single yard required operation between those areas to be characterized as taking place within a yard.

2. In *Louisville & Jeffersonville Bridge Co.* v. *United States*, 249 U.S. 534, the Court held a run of an engine and 26 cars for a distance of over three-quarters of a mile from one yard to another to be the run of a "train" and recognized a distinction only for "a sorting, or selecting, or classifying" of cars, involving coupling or uncoupling, and the movement of "one or a few at a time for short distances" (249 U.S. at 538–539). In the *Louisville* case the train was moved back-

ward as well as forward in the course of its run. In construing the statute, the Court specifically refused to consider "what other precautions will equal, in the promotion of safety, those prescribed by the act" (249 U.S. at 539).

3. In *United States* v. *Northern Pacific Ry. Co.*, 254 U.S. 251, the Court directly held that a movement need not be over "main" line tracks to constitute the running of a train. Moreover, the fact that the tracks there involved had a switchyard along the route, as well as at each end, did not make a switching operation out of the four-mile runs of trains of 40 to 48 cars which did not use intervening switching facilities, even though those facilities were used at other times in other movements.

4. This Court's four decisions accordingly establish a clear definition of a "train" and preclude judicial reappraisals of the safety factors existing in particular sites. They also preclude consideration of what is done with the trains before or after the runs. The purpose of the legislation being remedial—the promotion of the safety of railroad employees and the public—liberal construction is warranted and given by this Court. Under that construction, respondent's actions here are clearly stamped for what they are—the running of "trains."

5. However, some courts of appeals have drifted, with the passage of the years, into reasoning—and upon occasion, holdings—confusing the question of what constitutes a "train" with the appraisal of the numerous elements of danger which induced, or were supposed by a court to have induced, Congress to

numbering less than 23 cars, and traveling unbroken distances of at least two miles in three cases and more than a mile in the other case. By no stretch of language can these facts be brought within this Court's words relating to the actual work of "sorting, or selecting, or classifying" cars, in movements of "one or a few" cars "for short distances." In the *Louisville* case, in which the Court directly stated the distinction, a movement of 26 cars for three-quarters of a mile was held not to be switching, and power brakes were required. A *fortiori*, here the unbroken movements of from 23 to 29 cars, for at least a mile, and in all but one instance for two miles, were runs of trains.

B. The majority below also erred in considering what was done with the trains before and after their runs. In all four of its decisions, this Court refused to take assembled groups of engine and cars out of the statutory language ("any train") merely because they were transporting cars from one place for switching to another. The instant case involves a situation even less amenable to this repeatedly rejected contention, for in the four prior cases before this Court, there were true switchyards at both ends of each run, whereas here at one end of each trip there was not a switchyard but an industrial plant. The entire train of cars, in each instance, was delivered intact to the ultimate consignee or was received intact from the consignor.

A similar disregard of the rulings of this Court is involved in the consideration given in the majority opinion below to what was done at other, unrelated, times on the same tracks with other cars. The court

states that the "nature of the work, its purpose and character" are "precisely the same" whether "every other spur is to be worked" (R. 67). When cars are being continually coupled and uncoupled, the operation is different from a straight run of a mile or two. The distinction was recognized by this Court in its *Northern Pacific* decision, *supra*, where it was likewise urged that other trains used not merely spurs but a switchyard midway along the route. Here, none of the spurs was worked on the runs in question. Moreover, the situation was not one in which trains moved for the purpose of making numerous pickups and went on through by reason of unexpected contingencies—here the runs were, from the outset, known to be through runs.

C. The court below ascribed to Congress an intention to distinguish between "switching operations" and an "over-the-line run" or a "fast, through train" or "movements between major terminals" or on "main" line tracks. But this language was not used by the Congress. This Court, in its *Northern Pacific* decision, *supra*, unequivocally held to the contrary, stating that "there is nothing in the act which limits the application of the provision here in question to operations on main line tracks" (254 U.S. at 254).

Similarly contrary to the decisions of this Court is the reliance placed by the court below on the factor that the operations took place within yard limits. Clearly, the runs extended far beyond the classification yard itself, since under the undisputed facts the track in question ran for nearly two miles from the

area where the trains were broken up, or assembled, to the plants of the various consignees. And, in any event, both this Court and the appellate courts which have followed its construction have given no weight to the fact that operations occurred within "yard limits."

As for the attempt of the majority below to minimize the dangers of the operations, that type of appraisal is for the Congress alone to make. The courts must decide only whether "any train" was run. Moreover, the majority below, in its attempted assessment of the dangers, substantially overlooked the major emphasis of the legislative history, *i.e.*, the need to eliminate use of hand brakes and the need to protect employees, upon any stopping of the train, against the chain-reaction impact of unbraked cars jolting through the slack. Congress was clearly convinced that a train without brakes in operation upon a minimum percentage of its cars was always subject to numerous potential dangers. Congress wrote no exception into the statute for the various cases in which one or more of the dangers was reduced or absent. It did not exempt trains going at less than a certain rate of speed, or trains moving in supposedly safeguarded areas, or trains having some special purpose such as transporting cars from one yard or terminal to another. Switching operations, as described by this Court, are exempt only when performed in such small units and for such short distances as to be outside the concept of the run of a "train."

ARGUMENT

I

THE STATUTORY REQUIREMENT THAT POWER BRAKES BE IN OPERATION ON "ANY TRAIN" APPLIED TO THE RESPONDENT'S FOUR UNITS, EACH CONSISTING OF AN ENGINE AND CARS COMPLETELY ASSEMBLED FOR AN UNBROKEN RUN OF TWO MILES IN THREE INSTANCES AND OF AT LEAST ONE MILE IN THE FOURTH INSTANCE

Congress, in its safety appliance legislation (*supra*, pp. 2–4), has required that air brake connections be coupled on "any train" used on the railroad's "lines." The government's position is that, in using the term "any train," Congress meant to include every movement of an assembled group of cars with an engine for an appreciable distance without coupling or uncoupling cars. This Court so held nearly forty years ago in a group of four decisions. The Court below and some other circuit courts,[5] have misconstrued the statute by reading into the clear and simple standard of "any train" considerations which have nothing to do with the only question at issue under the statute, *i.e.*, whether a train was assembled and run as a unit, as distinguished from a switching operation.

A. THE STATUTORY LANGUAGE REQUIRES POWER BRAKES IN THE CASE OF "ANY TRAIN" WITHOUT REGARD TO THE AREA WHERE THE TRAIN RUNS

The language employed by Congress in the railroad safety appliance law is inclusive; the brake require-

[5] In addition to this case, there is presently pending before this Court the government's petition for a writ of certiorari (No. 24) to review the judgment of the Court of Appeals for the Seventh Circuit in *United States* v. *Terminal Railroad Association of St. Louis*, presenting similar issues. 260 F. 2d 884.

ment applies to "any" train (*supra*, pp. 2–4). Where Congress chose to make an exception, as it did on two occasions, it did so specifically in the instances—here concededly inapplicable—of "trains composed of four-wheel cars" or "trains composed of * * * standard logging cars * * *" (*supra*, p. 3).[6] In making these exceptions, Congress still referred to the excepted units as "trains." This fact in itself suggests the error in the majority decision below in taking a so-called transfer train out of the scope of the phrase "any train" because of such a train's differences from a "fast, through train" or "main line" haul (*supra*, p. 9). Considering the trains Congress thought it necessary to exempt specifically, it appears that "any train" was designedly used to cover broadly all movements of an assembled group of an engine and cars. Congress made no exception, expressly or by implication, for trains running—or supposed to run—below a certain rate of speed, or for trains operated by personnel designated as "switch" or "yard" personnel, or for trains operating within areas or on particular tracks which a railroad may choose to call a "yard", or for trains running on trackage protected by grade-crossing devices deemed by the railroads to be an adequate substitute for the braking power which

[6] Congress created these exceptions in the original specific proviso of Section 6 of the Act of March 2, 1893 (27 Stat. 532) by amendment on the floor of the Senate (24 Cong. Rec. 1477–1478), stating "nothing in this act contained shall apply to trains composed of four-wheel cars or to locomotives used in hauling such trains", and in an even more detailed exception of logging cars, spelled out in precise language in the Act of April 1, 1896 (29 Stat. 85) (*supra*, p. 3).

the Congress has ordered. Notably absent from the statutory provision is any use of the term "switching operation." As will be shown below, *infra*, pp. 28–39, the government and, later, this Court in its four definitive decisions have believed that the term "train" is inapplicable when an engine is merely shunting "one or a few" cars around for short distances in the actual, direct operation of "sorting, or selecting, or classifying" cars, involving coupling and uncoupling.[7] In the true switching operation, there is no "train." The statute has not, however, exempted "switching operations" generally by using that term. Much less has it exempted any and every run of an assembled train that can be related to "switching" merely because the run was preceded or followed by switching—as all runs must be—or because the train runs over trackage used at other times by other, unassembled, units for the brief, limited, operations of actual switching. Nor does the statute make exemptions under the terms "transfer trains", "drags of cars", or any of the other euphemisms employed by the railroads. This Court has four times rejected the contention that "transfer trains" are exempt (*infra*, pp. 28–39), a necessary consequence of the designedly broad language employed by the Congress. The whole effort below to deny that movements of "trains" were involved, rests, not upon what may be found in the statutory language, but upon a revival of the four-times-rejected contention

[7] Here, of course, there were not "one or a few" cars but assembled trains, none of them less than 23 cars in number, making unbroken direct runs of at least a mile in one case, and over two miles in the others (*supra*, p. 6).

that a train is not a train when it is running upon a track which the railroad chooses to designate as part of a yard or terminal and which connects with some spurs (even though here that track extends out of the actual switchyard for two miles through a town).

The respondent's contention is thus, at the very outset, contrary to the clear statutory language by which the Congress, except for the specific exclusion of logging trains and trains of four-wheel cars, applied the power brake requirements unequivocally to "any train" (*supra*, pp. 2–4). No definition or limitation was provided because none was required for this well-understood term.

B. THE LEGISLATIVE HISTORY OF THE POWER-BRAKE PROVISION DISCLOSES NO PURPOSE TO EXCLUDE "TRANSFER TRAINS"

1. *The primary purpose of the provision was to protect employees*

Congress enacted the main body of the power-brake legislation in 1893, requiring that a sufficient number of cars on any train be equipped with power brakes so that the engineer "can control its speed without requiring brakemen to use the common hand brake for that purpose" (*supra*, p. 2). The legislation was supplemented, in 1903, to provide that a minimum percentage of the cars on any train have power brakes under the control of the engineer,[1] and to require all additional cars with power-brake equipment, beyond those constituting the stated percentage,

[1] The percentage was raised, as more brake-equipped cars became available, from 50 per cent in 1903 to 85 per cent in 1910 (*supra*, pp. 3–4).

have their brakes within the control of the engineer (*supra*, pp. 3–4).[9]

In appraising the contentions of the railroads, repeatedly rejected by this Court, it is important to note that the safety appliance legislation arose, not primarily in relation to matters of general safety such as grade crossings or collisions, but in reaction against a virtual slaughter of employees operating hand brakes on freight trains and engaged in hand-coupling operations. In introducing the legislation on June 27, 1892 (H.R. 9350, 52d Cong., 1st Sess.), the House Committee on Interstate and Foreign Commerce submitted a report disclosing that over a thousand employees had been killed in falls from trains and engines in 1889 and 1890, and over 4,350 injured (H. Rep. No. 1678, 52d Cong., 1st Sess., p. 2). The very title of the report, "Safety of Railway Employes and the Traveling Public", accorded precedence to the problem of safety for the train crew,[10] and the major portion of the report dealt with that problem. While the report adverted to the objective of passenger safety where tracks were in constant use by both passenger and freight trains (*id.*, p. 5), the primary emphasis was upon reducing the need for employees operating hand brakes by going along the tops of

[9] This latter provision, in conjunction with more recent provisions concerning brake requirements in interchange of cars between railroads, now makes the minimum percentage in essence a 100 per cent requirement. *Power Brakes and Appliances for Operating*, 91 I.C.C. 481. See Commission order of May 30, 1945, Docket 13528 (49 C.F.R., 1945 Supp., 132.3).

[10] The same was true of the title of the Act, "An act to promote the safety of employees and travelers * * *" (27 Stat. 531).

cars (*id.*, pp. 1–5). Similar emphasis upon the underlying purpose of protecting *the train crew* appeared in the Senate Committee report (S. Rep. No. 1049, 52d Cong., 1st Sess., pp. 1–4), and in the discussion in the Senate on the day of submission of the report (23 Cong. Rec. 6358). In the testimony in hearings, appended to the Senate report, it was pointed out by a witness that "[m]ore people are killed through the lack of the air brake by falling from the cars * * * than are killed by the couplers" (S. Rep. No. 1049, *supra*, p. 21), and other witnesses repeatedly attested to the inadequate braking of freight cars and the consequent necessity of employees operating brakes from the tops of cars, and in the hurry of emergencies, thereby risking falls and injuries (*id.*, pp. 29–31, 109–110). Statistics on casualties from falling off trains, and discussion of this danger to the train crew, also reappeared in other testimony (*id.*, pp. 47, 53, 97, 109–110), and in the congressional debates (24 Cong. Rec. 1249, 1275–1276, 1287, 1417; 35 Cong. Rec. 7300).

In 1902, Congress considered several problems arising from experience with the 1893 legislation. One of these was the permitted exercise of judgment—and the abuse of judgment—in determining how many cars of a train needed to be within the power-braking control of the engineer to enable him to control the train's speed without requiring brakemen to use the common hand brake (S. Rep. No. 1930, 57th Cong., 1st Sess., pp. 7–8; 36 Cong. Rec. 2268). Another problem, more significant to the present case, was the continuing danger to employees upon stopping of a train containing a substantial number of cars whose power

brakes were not coupled up. The unbraked cars, due to the slack between them, would commence a chain reaction of violent impacts until stopped against the effectively braked portion of the train. The accumulated and unpredictable shock was sufficient to throw men from the trains. In more extreme cases, deaths and injuries came, not alone from falls, but because cars were crushed and wrecks occurred. These contingencies were extensively and repeatedly emphasized during the course of the legislation (S. Rep. No. 1930, 57th Cong., 1st Sess., pp. 7–8, 11–13, 46–47, 51, 95, 108, 115, 142, 145, 153; 35 Cong. Rec. 7300; 36 Cong. Rec. 2519). As stated in the House debate (36 Cong. Rec. 2519):

> Mr. UNDERWOOD. * * * I am willing to leave [to the Interstate Commerce Commission] the power to increase the minimum, but I want to take away from them the power to reduce it. My reason is this: * * * when [the railroads] come to make up their trains, no matter how many cars they have equipped with the air brake, they only couple together the air-brake connections on a few cars in front of the train, and then when they have to stop the train suddenly the other cars behind, which are left uncoupled, come down on the front cars like a battering ram, endangering the lives of the operators of the train.

In short, Congress was legislating primarily for the safety of employees in relation to the basic problem of possible stops, even at slow speeds, resulting in the jarring of men from the cars by the chain of unpredictable impacts of unbraked cars. When an engine is shunting one or a few cars in the brief starts and

stops of a true switching operation, men can remain continuously braced and alert during these brief periods, and can anticipate the impacts of one or two cars jolting through the slack. But human attention cannot remain as alertly focussed on a trip running, as in this case, for over a mile or two miles. In the event of a stop, the chain of jolts from 23 and more cars, all without brakes, is markedly more difficult to estimate, even at slow speed and whatever the ultimate destination. Another consideration—and an obvious one—was the critical importance, in every required sudden stop, of every foot of lessened movement made possible by power braking (S. Rep. No. 1930, 57th Cong., 1st Sess., p. 9; and see R. 80). Emergencies can make the stopping-distance critical even at the slowest speeds, *e.g.*, a man fallen from a train, or an automobile speeding onto a grade crossing.

2. *The legislative history negates any intent that the statutory reference to a railroad's "line" is restricted to the "main" line or "road" haul, or excludes operations within "yard limits"*

The statutory language, in its reference to the railroads' "line" (*supra*, p. 2; see 23 Cong. Rec. 5925), omitted any restriction to "main" line or "road" haul. Needless to say, the additional words could have been employed had there been any intent to effect such a restriction.[11] The reason why this was not done is

[11] That a train is not taken out of the ordinary meaning of the word "train" by reason of the train's being handled in a yard is attested in the following usage of the term, in a written statement by G. W. Rhodes, a member of the Master Car Builders' Association (Office of Assistant General Superintend-

apparent in the first committee report—the power-brake provision was only part of a broad and inclusive program encompassing other safety measures, such as driving-wheel brakes for locomotives, automatic couplers, draw-bar uniformity, and hand-hold irons (H. Rep. No. 1678, 52d Cong., 1st Sess., pp. 4–5). All of these safety measures were required in operations far short of main-line operations. Moreover, the emphasis was on freight operations, not passenger trains. The resolutions of state railroad commissioners and of railway unions demanding federal safety regulation had dealt with "freight" operations (*id.*, pp. 1–2), and the committee had recognized the better equipment of passenger trains and "the comparative immunity from danger of the passengers on railways" (*id.*, p. 7, "SAFETY TO TRAVELERS RECOGNIZED"). Thus, with primary emphasis on danger to train crews in freight operations, there would be no reason to restrict the coverage to "line" operations, which would

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ent, Burlington and Missouri River Railroad), presented in the hearings on the legislation (S. Rep. No. 1930, 57th Cong., 1st Sess., pp. 51–52, 116):

"* * * Under the old conditions [prior to power brakes and automatic couplers] it was not safe to run *trains* as fast as we now do, nor was it safe to switch *or handle* them *in the yard* as rapidly * * * [emphasis added]."

Similarly, the report of the Interstate Commerce Commission, embodied in S. Rep. No. 1930, *supra*, p. 87, used the term as follows:

"* * * [W]ithout the power brake it would be * * * practically impossible, in the great majority of cases [to move these trains] by reason of the difficulty of regulating the movements of the *trains at* stations, *yards* and meeting points * * * [emphasis added]."

not include the many typical runs of freight trains over direct tracks through cities or industrial districts, *i.e.*, to a large industrial plant. There is no indication of any legislative intent to exclude such runs of trains from the statutory safety precautions. Accordingly, the use of the very broad, inclusive term "line", like the use of "any train", represents proper correlation of the congressional language with the over-all legislative purpose. Neither should be rewritten to read "main line" or to exclude operations within "yard limits."

In short, it is clear that the safety of employees was the main source of concern to the Congress. The proponents of the legislation were not concerned alone with the public, which might stray onto tracks or grade crossings or might be involved in wrecks of freight trains with passenger trains on "main" lines. The hazards involved were not merely the sudden needs for stopping within a short space—although there the additional braking power might, upon occasion, be critical, even at slow speed. What primarily concerned the Congress was the more routine hazard that, on an insufficiently braked train, men would be sent atop the cars to use hand brakes, and the danger to the train crew on an unbraked train, that a stop would send the unbraked cars jolting forward in cumulative impacts sufficient to knock a man from the train.

These considerations of safety apply equally when any substantial number of cars is being hauled an appreciable distance, whether in an area designated as a yard or over a "main line," whether the ultimate

destination is a railroad terminal or an industrial plant. Congress was unwilling to trust the judgment of the railroads as to what would constitute minimum adequate safety measures for such a run. The considerations discussed below as to whether other measures might provide equal protection to the employees are not properly for the courts. Congress has fixed the minimum requirements it regarded as essential on "any train."

C. THE FOUR DECISIONS OF THIS COURT ON THE SUBJECT HAVE SPECIFICALLY HELD SO CALLED "TRANSFER TRAINS" TO BE SUBJECT TO THE POWER-BRAKE REQUIREMENTS AND HAVE REJECTED EFFORTS TO MAKE EXCEPTIONS ON THE BASIS OF THE ABSENCE, IN PARTICULAR OPERATIONS OR PLACES, OF ONE OR SEVERAL OF THE DANGERS SOUGHT TO BE AVERTED BY THE CONGRESS

After Congress enacted the power-brake requirement, the railroads sought to minimize its impact by limiting the concept of the term "train." The government itself had recognized that there were movements of cars in switching operations which could not be considered the movement of a "train." A car or two, actually being switched about by an engine, does not in ordinary usage constitute a "train." Nor would such a movement involve the dangers sought to be averted by the Congress. Since only one or a few cars would be involved, the braking power of the engine would be adequate, and there would accordingly be little occasion to send brakemen atop cars to use hand brakes. In the event of an emergency stop, there would be no great weight of cars to increase the distance for stopping, or the

impact of a jolt. Accordingly, these actual direct switching operations were not considered the movement of a "train."

Ignoring the fact that the basis of the distinction lay in the smallness and short-lived nature of the unit involved, the railroads sought to find the distinction almost entirely in a word which Congress had not employed at all, *i.e.*, "switching." The argument was, in effect, that since the small units that were not "trains" were engaged in switching, therefore all operations that could be said to be switching were equally not "trains." Wholly ignored was the cardinal fact that an assembled unit of an engine and cars going a substantial distance is an intrinsically different unit from an engine picking up and dropping cars in a true switching operation.

This Court squarely rejected the railroads' contentions. In the first two of its four decisions on the Safety Appliance Act (*United States* v. *Erie R.R. Co.*, 237 U.S. 402, and *United States* v. *Chicago, Burlington & Quincy R.R.*, 237 U.S. 410), it was not necessary to come fully to grips with the underlying fallacy, since the Court needed only to reject more superficial points, but in the third and fourth decisions (*Louisville & Jeffersonville Bridge Co.* v. *United States*, 249 U.S. 534, and *United States* v. *Northern Pacific Ry. Co.*, 254 U.S. 251) the Court met and rejected the basic contentions that a transfer train was exempt from the brake requirement because of its relation to switching activities, and that the safety requirements should be applied only to "main" line operations.

1. *In its* Erie *and* Chicago, Burlington *decisions, this Court held that runs of assembled units of engines and cars were not outside the safety requirements for "trains" merely because the runs were between yards at which switching had been done or would be done, or because the railroads designated the yards and connecting tracks as a single "yard"*

In both the *Erie* (237 U.S. 402) and *Chicago, Burlington* (237 U.S. 410) cases, *supra*, the railroads relied on the government's treatment of switching operations as not involving a "train" (O.T. 1914, No. 580, Defendant's Br. 29; O.T. 1914, No. 630, Resp. Br. 41), without analyzing the basis and narrow limitation of the interpretation.[12] The railroads sought to equate true switching operations with the running of trains of cars from one locale of switching operations to another.

In *Erie*, the railroad maintained two yards at Jersey City and Weehawken, respectively, and a third at Bergen, two miles and three and one-half miles, respectively, from Jersey City and Weehawken (237 U.S. at 403). While some trains ran from the west through Bergen with only a temporary stop, the greater part of the traffic was broken up or assembled at Bergen and moved between the yards in "transfer trains"—or in the railroads' phrase "drags of cars"—

[12] The dissenting opinion of Judge Hook, when the *Chicago, Burlington* case was in the Court of Appeals, clearly envisaged the limitations on the exemption (211 Fed. 12 at 20-21):

"* * * [I]t is another thing to declare generally that switching operations are without the statute, and then to attribute to that phrase such a broad meaning as to impair the very intent of Congress. * * * [T]he phrase 'switching operations' does not appear in the statute, though that would have been the easy, obvious way had Congress broadly intended to exempt them. * * *"

which ran only between the yards (237 U.S. at 404). The particular trains involved numbered from 17 to 33 cars (O.T. 1914, No. 580, Gov. Br. 5). The principal thrust of the Erie's argument was that only a single yard was involved. It used such language as "one general terminal," "a switching unity," and "a unitary combination system," asserting that no yard limits were designated between the three yards (O.T. 1914, No. 580, Defendant's Br. 19–21). The railroad contended that the main-line tracks, over which "scheduled" trains passed, did not go through "the freight yard" but were separate and ran around it, and that no passenger trains used the tracks over which transfers were made (*id.*, p. 19). It also referred to the slow speeds, the short distances of two and three-and-one-half miles, the absences of cabooses, the differences in markers, the absence of schedule, the control by yardmasters, and the use of switch engines and switch crews (*id.*, pp. 17–19). This Court found it unnecessary to consider the relevance of some of these contentions, since it rejected the factual assertion that only a single yard was involved (237 U.S. at 406) and that main-line tracks were not used, pointing out, as to the latter contention, that the tracks were used by other freight trains, both through and local (237 U.S. at 408).[15]

In this context, the Court's statement, relied upon by the respondent (Br. Opp. 4), that a train consists of "an engine and cars which have been assembled

[15] That the run was over so-called main-line track was, in any event, held to be of no significance in *United States* v. *Northern Pacific Ry. Co.*, 254 U.S. 251, discussed *infra*, pp. 36–37.

and coupled together for a run or trip along the road" (237 U.S. 407) is of no benefit to the respondent, for the Court found such a "run or trip along the road" in a run between railroad yards, at one or both ends of which run the train was assembled or broken up. The "road" is any part of the railroad's line, and not just the "main" line or road.

In the second of this Court's decisions, *United States* v. *Chicago, Burlington & Quincy R.R.*, 237 U.S. 410 (handed down a week after the *Erie* decision, *supra*), similar contentions of the railroad (O.T. 1914, No. 630, Resp. Br. 40, 51 [14]) were rejected. The three trains there involved transported 42, 36, and 39 cars, respectively, between yards two miles apart and, as distinguished from the respondent's trains, both ends of the connecting track—not merely one—led to yards for assembling and breaking up trains. Since the respondent (Br. Opp. 5) emphasizes this Court's statement in the *Chicago, Burlington* decision that "the controlling test" is in "the essential nature of the work done," it may be well to quote the Court's precise language (237 U.S. at 413):

> * * * That [the trains] carried no caboose or markers is not material. If it were, all freight trains could easily be put beyond the reach of the statute and its remedial purpose defeated. Neither is it material that the men in charge were designated as yard or switching crews, for the controlling test of the statute's application lies in the essential nature of the work done

[14] There was an additional argument that hand brakes were not required (*id.*, p. 56).

rather than in the names applied to those engaged in it.

Viewed in its context and in the light of the holding, the test laid down by the Court clearly consisted in appraising what work was being done at the time of the movement in question, and not what work was done before and after the movement. In that light, as we show *infra*, pp. 44–46, the work done by the respondent's trains was clearly the transporting of a train of cars and not an assembling or breaking up of a train.

2. *The* Louisville *case held a run of an engine and 26 cars for a distance of over three-quarters of a mile from one yard to another to be the run of a "train," and recognized a distinction only for movement of "one or a few" cars "for short distances" in the actual work of "sorting, or selecting, or classifying," involving "coupling and uncoupling"*

Since both the *Erie* and *Chicago, Burlington* opinions embodied references to some of the particularly aggravated facets of danger there involved, the next effort by some of the railroads was to argue that, when these particular elements of danger were not present and the movements bore some relation to switching, the movement was not covered by the legislation. In the third case before this Court, *Louisville & Jeffersonville Bridge Co. v. United States*, 249 U.S. 534, a typical operation involved an assembled unit of engine and 26 cars travelling a distance of three-quarters of a mile as follows:[15] the engine pushed the cars the length of the terminal yard, a distance of about 1,800 feet, and then an additional 1,100 feet upon a main line track. The movement was then reversed, the en-

[15] Actually the movements ranged from 12 cars to 32 (O.T. 1918, No. 312, R. 2).

gine now pulling the cars for a distance of 1,300 feet on another main-line track. Again reversing, the train moved 1,300 feet on main-line track, and into another railroad's yard (249 U.S. at 537; O.T. 1918, No. 312, R. 1–3). The railroad argued that travel was never outside one or the other of the yards except for the length of the train at one point, thereby seeking to distinguish the two-mile separation in *Erie* and *Chicago, Burlington, supra* (O.T. 1918, No. 312, Br. for Louisville Co. 5–7). The railroad also argued that the changes of direction precluded consideration of the movement as a running of a train (*id.*, p. 8).

The arguments were rejected by this Court, which definitely stated the distinction between the narrow limits of a switching operation and the running of a train (249 U.S. at 538–539):

> An engine and twenty-six cars, assembled and coupled together, not only satisfies the dictionary definition of a "train of cars," but would certainly be so designated by men in general and in any fair acceptation of the term must be regarded as constituting a train within the meaning of the statute. * * *
>
> The work done with the cars, as described, was not *a sorting, or selecting, or classifying* of them, *involving coupling and uncoupling,* and the movement of *one or a few at a time for short distances,* but was a transfer of the twenty-six cars as a unit from one terminal into that of another company for delivery, without uncoupling or switching out a single car, and it cannot, therefore, with propriety be called a switching movement.

> * * * This is not only a train movement, but it would be difficult to imagine one in which the control of the cars by train brakes would be more necessary, in order to secure that safety of employees, of passengers and of the public which it is the purpose of the act to secure, by requiring that engineers shall be given control sufficient to stop any train they may be moving, promptly on the first signal or sight of danger. The mere inertia of twenty-six cars, which must usually be loaded, and especially when running 15 miles an hour, would render it impossible to control or to stop them promptly with power-brakes operative only on the engine, and *the ability to use such brakes on the entire train must often mean the difference between safety and serious accident* when running, as here, in a crowded *yard*, across busy city streets and on main line tracks of railroads. [Emphasis added.]

The Court thus established a precise and workable distinction. It did not condition the distinction upon the concurrent presence of the various dangers which it noted as additional. That is clear from the above language and from the Court's further statement (249 U.S. at 539):

> * * * [T]he construction which the act should receive is not to be found in balancing the dangers which would result from obeying the law with those which would result from violating it, nor in considering what other precautions will equal, in the promotion of safety, those prescribed by the act. Such considerations were for Congress when enacting the law and it has repeatedly been held by this court

> that other provisions of the Safety Appliance Act impose upon the carrier the absolute duty of compliance in cases to which they apply and that failure to comply will not be excused by carefulness to avoid the danger which the appliances prescribed were intended to guard against, nor by the adoption of what might be considered equivalents of the requirements of the act. * * *

3. *The* Northern Pacific *decision held that it was not necessary, in order to fall within the definition of a "train," that the movement be over "main-line" tracks or outside "yard limits"*

Despite the Court's clear separation, in *Louisville, supra*, of its observations on various dangers from its statements of the elements which alone were critical under the Act, there was further effort by a railroad in this Court to inject a collateral inquiry as to substitute safety precautions and as to the presence or absence of main-line travel. In *United States* v. *Northern Pacific Ry. Co.*, 254 U.S. 251, the railroad urged that the four miles of tracks over which transfer trains of 40 and 48 cars were run were not main-line tracks and that, accordingly, only exempt switching operations were involved (O.T. 1920, No. 88, Resp. Br. 4–5). The railroad also urged (as in the instant case) that at other times other trains picked up and set out cars at points along the particular tracks (*id.*, p. 7) and that the tracks, together with the yards at each end and the yards along the tracks, were "operated as one yard" (*id.*, p. 7) and constituted "isolated tracks devoted to switching" (*id.*, p. 5).

The Court did not accept the railroad's contention that no main-line travel was involved (254 U.S. 254), but did not stop there. Speaking for a unanimous Court, Mr. Justice Brandeis stated, broadly and unequivocally (254 U.S. 254–255):

> * * * [*T*]*here is nothing in the act which limits the application of the provision here in question to operations on main line tracks.* The requirement that train brakes shall be coupled so as to be under engine control is in terms (32 Stat. 943) applicable to "all trains * * * used on any railroad engaged in interstate commerce." It is admitted that this railroad is engaged in interstate commerce; and the cases cited show that *transfer trains, like those here involved, are "trains" within the meaning of the act. A moving locomotive with cars attached is without the provision of the act only when it is not a train;* as where the operation is that of switching, classifying and assembling cars within railroad yards for the purpose of making up trains. *Congress has not imposed upon courts applying the act any duty to weigh the dangers incident to particular operations;* and we have no occasion to consider the special dangers incident to operating trains under the conditions here presented. [Emphasis added.]

4. *This Court's four decisions together establish a clear definition of a "train", and preclude judicial reappraisal of the dangers in particular places and judicial consideration of what was done with the trains before or after they had begun or finished their runs*

In the series of four decisions discussed above, this Court established clear and workable rules, as follows:

An engine and a number of cars assembled together constitute a train (*supra*, p. 34); while the movement of "one or a few" cars at a time in the actual, immediate work of "sorting, or selecting, or classifying" cars, directly "involving coupling and uncoupling," is not the running of a "train", but a mere switching of cars (*supra*, p. 34). It is not mere switching of cars when an assembled train moves a substantial distance—*e.g.*, in excess of three-quarters of a mile—even though the movement may be for the purpose of delivering the chain of cars to or from a place where actual switching operations have taken place or will again take place (*supra*, pp. 33-34). The fact that the track over which the train is run is not used by passenger trains, through trains, or scheduled trains, is otherwise not considered "main" line, or is within "yard limits", does not absolve the railroad from the statutory safety requirements (*supra*, pp. 36-37). *A fortiori*, the railroads cannot exclude runs of trains from the safety requirements by equipping the trains with markers different from other trains, by leaving cabooses off such trains, by running the trains with particular personnel or types of engines, by employing special rules as to speed or type of supervision, or by designating the particular track as a part of a yard or terminal or "switching unity" (*supra*, pp. 31-33).

These simple rules are securely grounded in the purpose of this safety legislation, as stated in its preamble, to promote the safety of employees and the traveling public, and the principle that, as a remedial statute, it should be construed liberally to effectuate

its purpose. *Baltimore & Ohio R. Co. v. Jackson*, 353 U.S. 325, 329, 333; *New York Central v. United States*, 265 U.S. 41, 44-45; *Louisville & Nashville R. Co. v. Layton*, 243 U.S. 617, 620; *Lilly v. Grand Trunk R. Co.*, 317 U.S. 481, 486; *Atchison, T. & S.F. Ry. Co. v. United States*, 244 U.S. 336, 343.

3. Some courts of appeals have wrongly misconstrued this Court's decisions.

On the basis of the opinions of this Court (*supra*, pp. 28-39), it could be expected that there would be little further difficulty in recognizing and carrying out the mandate of the Congress. For a time, the courts of appeals, with only a few deviations (discussed *infra*, p. 40 *ff.*), resisted the various efforts to discover a switching operation because of this or that particular

[*] We think it corroborative of this Court's views concerning the essential nature of a transfer train as being a "train," that, in the 1953 rules of the Association of American Railroads for testing of air brake equipment (in effect prior to the instant trial, and since given official status, in amended form and substance, pursuant to the Power or Train Brakes Safety Appliance Act of 1958, 72 Stat. 86; 49 C.F.R. (1959 Cum. Supp.) Part 132), Rule 25(a) provided for initial air-brake tests on all freight trains whereas, when it was the objective to deal only with "road" trains (as in tests other than initial tests, Rule 42(a)), the term "road train" was specifically used. That transfer trains were otherwise included is indicated in the fact that when some reduction in the prior requirements for such trains was to be effected in the rules, this was done specifically, appearing now in 49 C.F.R. (1959 Cum. Supp.) 132.13(e) with respect to "(1) Transfer train and yard train movements not exceeding 20 miles," and "(2) Transfer train and yard train movements exceeding 20 miles * * *." (A copy of the 1953 rules has been lodged with the Clerk of this Court).

facet of a transfer train's locale or operation.[17] But some circuits have issued opinions confusing the question of what constitutes a "train" with the appraisal of the numerous elements of danger which induced, or were supposed by a court to have induced, the Congress to enact the legislation. Considerations which had been used by this Court only to illustrate or give force to its broad standard that power brakes must be operated on "any train," were lifted out of context and given improper status, not as illustrations, but as standards in determining whether a movement was a train movement, *e.g.*, such matters as the number and nature of grade crossings, the use of the "main" line, the substituted precautions, etc.[18] We believe a

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[17] *Chesapeake & O. Ry. Co.* v. *United States*, 226 Fed. 683, 687 (C.A. 4); *United States* v. *Galveston, H. & H.R. Co.*, 255 Fed. 755, 758, and 265 Fed. 266, 267 (C.A. 5), certiorari denied, 254 U.S. 643; *Great Northern Ry. Co.* v. *United States*, 288 Fed. 190, 191 (C.A. 8); *Great Northern Ry. Co.* v. *United States*, 297 Fed. 692, 696 (C.A. 9); *Illinois Cent. R. Co.* v. *United States*, 14 F. 2d 747, 749 (C.A. 8), certiorari denied, 273 U.S. 752; *Chicago & E. R. Co.* v. *United States*, 22 F. 2d 729, 730 (C.A. 7); *Chi., St. P., M. & O. Ry. Co.* v. *United States*, 36 F. 2d 670, 671 (C.A. 8); *United States* v. *Northern Pac. R. Co.*, 54 F. 2d 573, 574 (C.A. 9); *United States* v. *Southern Pac. Co.*, 60 F. 2d 864, 865 (C.A. 9), certiorari denied, 287 U.S. 667; *United States* v. *Southern Pac. Co.*, 100 F. 2d 984, 986 (C.A. 9), certiorari denied, 307 U.S. 633; *United States* v. *South Buffalo R. Co.*, 168 F. 2d 948, 952 (C.A. 2), certiorari denied, 335 U.S. 870; *United States* v. *Panhandle & Santa Fe Ry. Co.*, 203 F. 2d 241, 243 245 (C.A. 5); *United States* v. *Thompson, Trustee, Mo. Pac. R. Co.*, 252 F. 2d 6, 9 (C.A. 8).

[18] The Ninth Circuit, in 1934, in one instance relied on the fact that switching operations preceded and followed the transfer movement (*United States* v. *Great Northern Ry. Co.*, 73 F. 2d 736, 739 (C.A. 9), Judge Wilbur dissenting, certiorari denied, 295 U.S. 752), but returned, in 1939, to holdings consistent with the holdings of this Court (*United States* v. *Southern*

recent opinion based on this erroneous approach is *United States* v. *Terminal Railroad Association of St. Louis*, 260 F. 2d 884 (C.A. 7), pending in this Court

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Pac. Co., supra, 100 F. 2d 984, 986, 988 (C.A. 9), certiorari denied, 307 U.S. 633). See reference to this return, in *United States* v. *South Buffalo R. Co., supra*, 168 F. 2d at 952 (C.A. 2), certiorari denied, 335 U.S. 870.

The Seventh Circuit, found an exception on the basis of an extreme extension of the concept of a "yard" in *United States* v. *New York, C. & St. L. Ry. Co.*, 77 F. 2d 215, 216 (see comment in *United States* v. *South Buffalo R. Co., supra*, 168 F. 2d at 952 (C.A. 2), certiorari denied, 335 U.S. 870). In later cases it placed great weight on the degree of danger involved (*United States* v. *Elgin, J. & E. Ry. Co.*, 182 F. 2d 1; *United States* v. *Chicago, B. & Q.R. Co.*, 199 F. 2d 223, certiorari denied, 345 U.S. 908). As pointed out in the dissenting opinion of Chief Judge Sobeloff, below (R. 80-81), this Court's holding in the *Northern Pacific* case, 254 U.S. 251, was apparently overlooked in the *New York, C. & St. L. Ry. Co.* decision of the Seventh Circuit, *supra*, while in its *Elgin* case, the Seventh Circuit sought to distinguish *Northern Pacific* on the basis of the number of grade crossings, and in its *Chicago, B. & Q.R. Co.* case, again left this Court's *Northern Pacific* decision "undistinguished and unmentioned" (R. 81). The critical *Northern Pacific* decision, *supra* (pp. 36-37), was likewise left undistinguished and unmentioned in three of the four district court opinions cited by the majority below (*United States* v. *Pennsylvania R. Co.*, 80 F. Supp. 965 (D. Md.); *United States* v. *Great Northern Ry. Co.*, 103 F. Supp. 889 (W.D. Wis.); and *United States* v. *Staten Island Rapid Transit Ry. Co.*, 151 F. Supp. 911 (E.D.N.Y.)). In the fourth decision (*United States* v. *Texas & N.O.R. Co.*, 13 F. 2d 429 (S.D. Tex.), an entirely different factual basis was involved, *i.e.*, the shunting, within a mile, of 27 cars to 18 industries, the cars thus "constantly being cut out and in again" at about "every 100 yards or so" in the actual operations in question and not just before and after the runs (13 F. 2d at 431). This decision, we think, affords no support to the majority view below but, instead, emphasizes by contrast the true status of the respondent's movements here as runs of trains.

on the government's petition for certiorari (No. 24, this Term). The distances of travel without picking up or setting out any cars ranged from one and three-quarters miles to two and three-quarters miles, and the number of cars was 27, 25, 37, and 18, respectively (260 F. 2d at 885-886). The court, in a brief opinion, noted that the movements did not involve use of main-line tracks, that a yardmaster was in control, and that switching crews and switch engines were employed (260 F. 2d at 885). The court did not refer to the pronouncements of this Court on these matters in its *Northern Pacific* and *Erie* decisions, *supra*, pp. 30-32, 36-37. The court cited the *Northern Pacific* decision, without reference to its facts or holding, for language concerning switching of cars within railroad yards "for the purpose of making up a train" (260 F. 2d at 886), and relied, without detailed comment, upon its own prior decisions in the *Chicago, Burlington* and *Elgin* cases, discussed in footnote 18, *supra*, pp. 40-41 (260 F. 2d at 886).

Even some of the decisions in the courts of appeals which have reached the correct result, holding power brakes to be required, have done so on the basis of an appraisal of the dangers of the particular spots rather than by following the congressional mandate that every train movement have power brakes in full operation, *e.g.*, *United States* v. *Panhandle & Santa Fe Ry. Co.*, *supra*, 203 F. 2d 241, 246 (C.A. 5). The result has been fairly accurately described by the district judge in this case (whose decision the majority below affirmed) (R. 7-8):

> * * * [C]ourts have accomplished little other than to decide on the particular facts of the case whether the movement was that of a train within the meaning of the Act. It is apparent, therefore, that a holding in one case carries little weight as a rule for decision in another. Even when the facts of the case are disclosed, the question must depend largely upon the opinion or judgment of the court called upon to make the decision. And where the facts bring the case within the twilight zone, as we think they do in the cases before us, the opinion of one judge or court is likely to be as good as that of another."

The statute, as interpreted by the four decisions of this Court, is not properly subject to this characterization. It is capable of precise application. This Court recognized the Congressional mandate that any movement of an assembled group of cars with any engine for an appreciable distance without coupling or uncoupling of cars is the movement of a "train" and requires power brakes. If the railroads believe such a requirement is economically unsound or oppressive, it is to Congress that they should address their arguments. Congress believed such a requirement was necessary for the safety of the public and even more for the safety of railroad employees.

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[1] This language was quoted by the district judge from a Seventh Circuit decision (*United States* v. *Chicago B. & Q.R. Co.*, 199 F. 2d 223, 226), one of the cases in which that circuit, as observed *supra* (pp. 10, 11, fn. 18), diverged from the holdings of this Court and exempted transfer trains from this safety legislation.

II

THE COURT BELOW ERRED IN ABANDONING THE TEST OF WHETHER A "TRAIN" WAS INVOLVED, AND IN DECIDING INSTEAD ON THE BASIS OF THE ABSENCE OF "MAIN" LINE TRAFFIC AND OF SPECIFIC ELEMENTS OF DANGER

When the proper standard, fixed by this Court, is applied to the operations at issue here, we think it becomes clear that on all four counts violations by the respondent were proved.

A. THE RESPONDENT'S OPERATIONS DID NOT CONSIST OF MERE SHUNTING OF "ONE OR A FEW" CARS IN ACTUAL "SORTING, OR SELECTING, OR CLASSIFYING," BUT INVOLVED RUNS OF TRAINS IN NO CASE NUMBERING LESS THAN 23 CARS AND TRAVELING UNBROKEN DISTANCES OF AT LEAST A MILE IN ONE INSTANCE AND TWO MILES IN THE OTHERS

In the four assembled units of engine and cars here involved, the number of cars was in no case less than 23 cars and the distance of unbroken travel was in no case less than a mile. Specifically, one engine and 26 cars made an unbroken run of over two miles. The second, with 28 cars, and the fourth, with 23 cars, also made unbroken runs of two miles, and the third, with 29 cars, made an unbroken run of over a mile.

Indeed, the description of this last run as for only a mile is ultra-conservative. A mile was the approximate distance of the indisputably unbroken run from the Allied Chemical plant to the Norfolk & Western interchange point, and we have treated it as the total run. But after a single group of additional cars was picked up at this one stop, the train proceeded with its original cars and the additional 20 for the remainder of the run, for an actual total of two miles, the

last portion with 49 cars. We do not, by our statement of cars and mileage, concede that a train ceases to be a train at the instant of merely a single pickup. It is, for example, common practice even for through passenger-trains to pick up and set out cars. Thus, on one line, Washington-Chicago trains set out and pick up cars at Pittsburgh and pick up and set out cars from or to Wheeling at Willard, to say nothing of the dropping off and picking up of lounge cars and diners (Official Guide of the Railways, June 1959, p. 361). But this comparatively minor activity could scarcely change the essential nature of the run as a Washington-Chicago run of a "train" nor would it permit lessened safety requirements. Accordingly, in the instant case, while we understand the caution in the dissenting opinion of Chief Judge Sobeloff, in excluding the third train from his dissent (R. 81), we believe that such exclusion is unnecessary in light of the undisputed distance of a mile even to the Norfolk & Western interchange track and in view of the fact that this single pickup scarcely involved the "frequent" coupling and uncoupling of the brakes to which reference is made elsewhere in the dissent (R. 78).[*]

The operations of the respondent were the running of trains. By no stretch can the facts be brought within this Court's designedly narrow language distinguishing a mere switching operation as a movement

[*] The majority opinion (at R. 67, fn. 3) cites the railroad's records to the effect that another movement may also have involved an intervening pickup but the finding of fact by the District Court (R. 11 paragraph 11), as pointed out by Chief Judge Sobeloff, resolved this conflict of testimony (R. 73, fn. 1).

of only "one or a few" cars "for short distances," nor can it be said that such transporting of whole trains of cars constitutes the actual "work" of "sorting, or selecting, or classifying" cars. *Louisville & Jefferson Bridge Co.* v. *United States*, *supra*, 249 U.S. 534, 538. Were there any possible doubt of the applicability and conclusiveness of the *Louisville* standard here, it need only to be recalled that in that case this Court considered—and treated as a "train"—an engine and 26 cars, traveling only three-quarters of a mile, the run involving a pushing forward, a pulling back, and additional stops and changes of direction in transporting the train from one switchyard to another (*supra*, pp. 33–36).

B. WHAT WAS DONE WITH THE TRAINS BEFORE OR AT THE END OF THEIR RUNS OR BY OTHER CARS AT OTHER TIMES IS IMMATERIAL

In all four of its decisions this Court refused to take assembled groups of cars-and-engine out of the statutory language "train" merely because they were transporting cars from one place for switching to another (*supra*, pp. 30–37). The Court refused to recognize as controlling that the train had been assembled just before the trip in question and that it would be broken up at the end of the trip. The instant case involves a situation even less amenable to exception than the four decisions in which this Court rejected the railroads' contentions. In those cases, there were true switchyards at both ends of each run, whereas here one end of the trip was, in each instance, not a railroad yard but an industrial plant. The entire train of cars, in each instance, was delivered intact to the ultimate consignee or was received intact from the con-

signor. Only at one end of each run was there contact with a railroad classification yard, or in the case of the third run, contact with an interchange track to add cars (*supra*, pp. 4–7). Since this Court, in the four decisions discussed *supra*, rejected the attempted classification of a trip between two switch-yards as a switching operation, there is even less basis for such a description here when one end of the trip is a beginning or end common to every ordinary freight run, *i.e.*, the receipt of the chain of cars from the consignor, or the delivery to the ultimate consignee. The majority below, in effect, applied the reasoning concerning "transfer" trains and the unlimited breadth of "switching operations" that was rejected in the first of the decisions of this Court (*supra*, pp. 9, 30).

The court below repeatedly refers to direct, unbroken transportation of cars to an independent company's plant, two miles distant from the yard, as a "distribution" (R. 65, 67, 69)—a word carrying some of the connotation of a small switching procedure. A more appropriate term would probably be "delivered." But the really significant fact is that there was an unbroken run of a mile or two before any action that could be characterized as switching. That, under this Court's decisions, was the movement of a train.

A similar disregard of the rulings of this Court is involved in the consideration given in the majority opinion below to other operations at other times over the same tracks. The court asserts (R. 67):

> * * * The nature of the work, its purpose and character are precisely the same whether every other spur is to be worked, only those between the classification yard and the interchange track or only those, or one of them, between the interchange track and the end of the lead track. * * *

This is not accurate. The operation is clearly different when cars are being continually coupled and uncoupled. Moreover, this consideration by the court of what other trains may do on the same track at other times fails to deal with the decision of this Court in *Northern Pacific*, *supra*, 254 U.S. 251, in which trains other than those in question likewise made stops along the route, and in which the point was diligently argued by the railroad (O.T. 1920, No. 88, Resp. Br. 7). There the tracks, over which this Court required power-brake operation, had a switchyard, not merely spurs, *along* its route, but this Court observed (254 U.S. at 253):

> * * * The switching, assembling and classification of cars for its through and local freight is done in the Rice's Point yard where there are fifty-five tracks, each four thousand feet long and at Furnace, where there are fifteen tracks, cars are also switched and assembled. At Berwind and Boston, two intermediate points, where there are respectively nine and six tracks, cars are frequently set out or picked up by transfer trains. *The transfer trains here in question appear to have run solid between Rice's Point and Furnace.* * * * [Emphasis added.]

Thus it is clear that in *Northern Pacific* the rule was laid down that the controlling factor was what the train in question was doing, and not, as held in the decision below, what other operations might do in the same place at other times. In the actual movements in issue here, *none* of the intervening spurs was worked. The situation, moreover, was not even one in which a train moved for the purpose of making numerous pickups and by reason of unexpected contingencies went on through. Here, the runs were, from the outset, known to be through runs, pursuant to the advance instructions issued (*supra*, p. 7). The brake lines could be connected without concern that the train would constantly be broken up or reassembled. The movement was, in the usual sense of the word, the operation of a train.

C. IT IS IMMATERIAL THAT THE RUN WAS NOT OVER A MAIN LINE AND WAS WITHIN YARD LIMITS

The opinion below ascribes to Congress an intention (R. 68)—

> to distinguish between an over-the-line run, during which the need of useful train brakes was great and obvious and compliance with the requirement would not unduly hinder railroad transportation, and switching operations, during which there is little or no need for train brakes and general and strict compliance with the requirement would be impossible or highly impractical.[21] * * *

[21] The court also speaks of "the distinction between the fast, through train and the simplest switching operation" (R. 68), and refers to "movements between major terminals" (R. 68), "over-the-line" runs (R. 67), and "main-line tracks" (R. 68–69).

The majority does not deal with, or distinguish, the unequivocal language of this Court in *United States* v. *Northern Pacific Ry. Co.*, *supra*, 254 U.S. 251, discussed *supra* (pp. 36–37), in which the Court was squarely confronted with the railroad's contention that the trackage used was not part of the railroad's "main" line.[22] This Court, after observing some respects in which the dangers of the particular trackage were in any event equivalent to those of a main line, proceeded to the broad and unconditioned language (254 U.S. at 254):

> But there is nothing in the act which limits the application of the provision here in question to operations on main line tracks. The requirement that train brakes shall be coupled so as to be under engine control is in terms (32 Stat. 943) applicable to "all trains * * * used on any railroad engaged in interstate commerce." * * *

This Court, in all its decisions, refused to treat as one yard what was in actuality a group of separate switching areas connected by tracks, or to treat as a mere switching operation a substantial unbroken run of an assembled chain of cars over such tracks between the actual switching areas (*supra*, pp. 30–39). In one holding (*Louisville & Jeffersonville Bridge Co.* v. *United States*, *supra*, pp. 33–36), the distance was only three-quarters of a mile, yet the Court rejected the euphemism "a circumscribed area used for switching

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[22] As observed by Chief Judge Sobeloff below (R. 77), the Court of Appeals whose holding (*United States* v. *Northern Pacific Ry. Co.*, 255 Fed. 655 (C.A. 8)) was reversed by this Court in the *Northern Pacific* decision took the approach now taken by the majority below. See, particularly, 255 Fed. at 657–658.

purposes" (249 U.S. at 535). But the opinion below considers it significant that the track here "is a part of the Hopewell Yard, and serves no purpose other than the distribution of cars" (R. 65). There is no significance in the fact that the deliveries of the trains were made to industrial plants.[23] Nor is there any statutory exemption of movements on trackage merely because the trackage originates at a switchyard and, like every track, has spurs at points along its route. The Fourth Circuit below recognizes that the actual work of breaking up and assembly of the instant trains was done "in the classification yard" (R. 65), but nevertheless treats the track winding through the town of Hopewell for two miles as merely a part of some superimposed yard.

Whether or not the entire area included within "yard limits" could be considered part of a railroad "yard" for other purposes,[24] the inclusion of such an extended area within "yard limits" cannot entitle the railroad to an exemption of all operations within that area from the Safety Appliance Act on the ground that they constitute "switching." This

[23] Moreover, as observed by Chief Judge Sobeloff (R. 75), this Court, by its approval of the decision in *United States* v. *Pere Marquette Railroad*, 211 Fed. 220 (W.D. Mich.), showed that a transfer train may consist of a train of cars transported to be unloaded as well as further forwarding. *United States* v. *Erie R.R. Co.*, 237 U.S. 402, 409.

[24] The Standard Code of Operating Rules adopted by the Association of American Railroads (Revised to October 1, 1953) defines "Yard" as follows (p. 11): "A system of tracks within defined limits provided for the making up of trains, storing of cars and other purposes, over which movements not authorized by timetable, or by train order, may be made, subject to prescribed signals and rules, or special instructions."

Court, in *United States* v. *Erie R.R. Co.*, 237 U.S. 402, 409, approved the holding of a lower court in *United States* v. *Pere Marquette Railroad*, 211 Fed. 220 (W.D. Mich.), which specifically dealt with operations within "yard limits."[25] And more recently the Court of Appeals for the Second Circuit applied the Act to the South Buffalo Railway, whose operations were described by the court as follows (*United States* v. *South Buffalo R. Co.*, 168 F. 2d 948, 949, certiorari denied, 335 U.S. 870):

> Its entire system of trackage is operated as a single yard. All of its crews are yard crews and they are paid at yard rates applicable to yard switching services. Through trains do not pass over its tracks. It does not have any block signal system and all its movements are made at slow speeds with a member of the crew stationed at the forward end of the locomotive so that he can see sufficiently far ahead to enable the movement to be brought to a stop within one-half of the range of his vision. All of its operating income and expenses is at the express direction of the Interstate Commerce Commission, classified as switching income and expenses.

When an area is not in fact utilized for taking trains apart, sorting out the cars, and putting them together again, the fact that it is included within "yard limits"

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[25] The description of the operations in *United States* v. *Northern Pacific Ry. Co.*, 254 U.S. 251, 252-253, makes it appear that they must have occurred within yard limits although the Court does not specifically so state. The Court of Appeals had stated in its opinion that "The yards along this 'D.T.' track are all operated as one yard." *United States* v. *Northern Pacific Ry. Co.*, 255 Fed. 655, 657 (C.A. 8).

for operating or rate purposes has no significance for safety appliance purposes.

As is noted above, *supra*, pp. 37–39, the standard of what is a "train" is a simple one and the recent decisions attempting to assess the danger in any particular factual setting disregard the standard clearly established by this Court. The courts below, instead of applying that standard, have attempted to use as criteria matters referred to by this Court in collateral explanation of the congressional purposes or in meeting assertions of litigant railroads. Arguments as to danger or lack of danger should be addressed to Congress and not to the courts. Nevertheless, it is appropriate to point out that, even in assessing this element, the majority opinion below fails to take into consideration the purposes of Congress, as revealed by the legislative history discussed *supra*, pp. 21–28.

We take issue with the assumption below that while on an "over-the-line run" there is need for power brakes, on the unbroken two-mile run through the town of Hopewell (which the majority would exempt), there is "little or no need" for power brakes, and that compliance with the statutes would be "impossible or highly impractical" (R. 68). The short answer to the alleged impossibility or impracticability of compliance is that the respondent did comply for four and one-half years, until its own *ex parte* determination that "there was no undue or unusual risk" (*supra*, p. 5). The expense of compliance and the alleged danger to employees coupling the power brakes was clearly a matter that had been brought before the Congress in its deliberations and had obviously been

found to be outweighed by the dangers of running trains without brakes on the cars (S. Rep. No. 1930, 57th Cong., 1st Sess., p. 71; 24 Cong. Rec. 1366–1367; 36 Cong. Rec. 2521–2522).

The discussion of danger in the opinion below does not deal at any point with the danger to the train crew in a long train of unbraked cars being stopped in a cumulative chain-reaction of cars jolting forward through the slack. Yet this was one of the serious dangers envisaged by the Congress (*supra*, pp. 23–25). Moreover, we do not agree with the reasoning below (R. 71) that "[w]hether or not a car has been placed upon a particular spur, the risk of collision with vehicular traffic at Randolph Street, and the other crossings, is precisely the same" (R. 71). If comparison is properly made between a train of many cars going along on a mile or two-mile run, as against a unit that is not a train (*i.e.*, an engine switching only one or a few cars for a short distance), the likelihood of accident even at grade crossings is not "precisely the same." As is suggested above, *supra* (p. 25), an engine's brakes can stop one, or a few, unbraked cars within a shorter distance than it can stop a whole train of twenty-three or more cars, and that difference can mean the difference between a fatality or the safety which the Congress sought to achieve.

The congressional effort was an effort to use every reasonable means of decreasing the hazards. Congress necessarily could rely only on general measures. In certain conceivable individual situations an engine and single car traveling only a few feet can, of

course, be lethal. But Congress was clearly convinced that a train, without brakes in operation upon a minimum percentage of its cars, was always potentially dangerous, and Congress wrote no exception into the statute for the various cases in which one or more of the dangers might be less serious. It did not exempt trains going less than a certain rate of speed, or trains moving in supposedly safeguarded areas, or trains having some special purpose such as transporting cars from one yard or terminal to another. "Switching operations" as such, as held by this Court, are exempt only when performed in such small units for such short distances as to be outside the concept of the run of a "train." No such small units or operations were here involved. The movements were plainly runs of "trains."

CONCLUSION

For the above reasons, we respectfully submit that the judgment of the court below should be reversed.

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In the

Supreme Court of the United States

October Term, 1959

No. 10

UNITED STATES OF AMERICA,

Appellant,

v.

SEABOARD AIR LINE RAILROAD COMPANY,

Appellee.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR SEABOARD AIR LINE RAILROAD COMPANY

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In the

Supreme Court of the United States

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No. 10

UNITED STATES OF AMERICA,
Petitioner

v.

SEABOARD AIR LINE RAILROAD COMPANY,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR SEABOARD AIR LINE RAILROAD COMPANY

QUESTION PRESENTED FOR REVIEW

The question presented for review is whether the Honorable Sterling Hutcheson, Judge, United States District Court for the Eastern District of Virginia, who was affirmed by the United States Court of Appeals for the Fourth Circuit, erred in finding that four movements of railroad cars on March 5 and 6, 1956, operating without power, or air, brakes in Seaboard Air Line Railroad Company's Hopewell, Virginia, yards were not "trains" within the

prohibition of the Safety Appliance Act and I. C. C. order against the operation of "any train" with less than 85% of the cars in such train equipped with "power or train brakes."

STATEMENT OF THE CASE

The United States of America, petitioner, brought suit against Seaboard Air Line Railroad Company in the United States District Court for the Eastern District of Virginia on June 11, 1956, alleging three violations on March 5 and one violation on March 6, 1956, of Title 45, U. S. Code, Sections 1 through 10, inclusive, and seeking to recover the statutory penalty of $100 for each violation. This portion of the U. S. Code is a codification of a 1903 amendment to the Safety Appliance Act, the amendment being the Act of March 2, 1903; c. 976, 32 Stat. 943. The amendment requires that 50% of the cars have their power brakes operating on any train required by the Safety Appliance Act to be equipped with power brakes. The amendment also gives the Interstate Commerce Commission authority to increase the percentage of cars on any train which must have their power brakes used and operating. Pursuant to this authority the Commission by order dated June 6, 1910 (49 C.F.R. 132.1) increased the minimum percentage from 50% to 85%.

Seaboard in its answer admitted the four movements alleged in the Government's complaint had occurred but denied the movements were of such nature as to require connected and operating air brakes. After hearing the witnesses in open court January 31, 1957, Judge Sterling Hutcheson, sitting without a jury, found the movements in question were *not train movements but switching operations* and therefore not subject to the air brake requirements of the Safety Appliance Act (R. 7).

Upon appeal by the Government to the United States Court of Appeals for the Fourth Circuit that court affirmed the trial court, Chief Judge Sobeloff dissenting as to three of the four movements but concurring as to the fourth (R. 64-81).

The Government then filed a petition for writ of certiorari. The writ was granted January 12, 1959 (R. 83).

The four movements in question are correctly described in the statement of facts in the Government's brief so far as it goes. However, the statement does not adequately describe the nature of the area in which the operation took place and the operation's crucial factors as to the applicability of the Act.

Seaboard's Hopewell yard consists of a classification yard located at the western end of the city and a lead track running eastwardly from the classification yard for approximately two miles to its termination at the Allied Chemical Corporation plant at the eastern end of the city (Appellate Exhibit 1 attached hereto; Defendant's Exhibit 2 below). There are nine spur tracks cutting off the lead track between the classification yard and the Allied plant. One of the spur tracks is an interchange track with the Norfolk & Western Railway Company; the rest run to the industrial plants in Hopewell. The purpose of Seaboard's Hopewell yard is to provide freight service for these industries in Hopewell, and its operation consists of switching cars between the classification yard and the various spur tracks (R. 44-46).

Seaboard's main line lies to the west of Hopewell. Bellwood, on the main line, is the western terminus of the spur line from Seaboard's main line into Hopewell (R. 9). All incoming trains come from Bellwood to Hopewell and terminate at the Hopewell classification yard and do not run through the town. At the classification yard the switch

engines and crews take over and break up the incoming trains and switch and block the cars to the various industries to which they are consigned in Hopewell.

Seaboard has no passenger trains into Hopewell and, of course, no through trains, since Hopewell is the end of the line, the James River being immediately west of the Allied Chemical plant and the Appomattox River to the north (R. 45, 46). There are no scheduled movements over any of the tracks involved. All movements are under the control of Seaboard's Hopewell agent (R. 48, 49).

Seaboard stopped connecting the air brakes January 10, 1956. But it was not until March 5 and 6, 1956, and then only as the result of a complaint by the Brotherhood of Railway Trainmen, that two Interstate Commerce Commission inspectors visited the Hopewell yard and observed the four movements complained of. They also observed several other movements over the same tracks but did not report them as violations because they were under one mile in length (R. 23, 26, 35, 36). In all other respects they were identical with the movements in question.

They made no inspection of the immediately adjacent and parallel tracks and yards of the Norfolk & Western Railway Company and the cars thereon where movements similar to those complained of in this case were taking place at the same time without connected air brakes. They did not even bother to observe whether the air brakes were connected on the Norfolk & Western (R. 31, 63).

If Seaboard is required to use air brakes in its operations in Hopewell, it will materially delay operations there and will entail an additional expense of at least $30,000 a year for extra crews (R. 51).

SUMMARY OF ARGUMENT

I.

One of the requirements of the Safety Appliance Act is that a certain percentage of power brakes be connected and ready for operation on "any train." Opinions have been handed down by this court in four previous cases involving this requirement. These four cases are *United States* v. *Erie R. R.*, 237 U. S. 402 (1915), *United States* v. *Chicago, Burlington & Quincy R. R.*, 237 U. S. 410 (1915); *Louisville & Jeffersonville Bridge Co.* v. *United States*, 249 U. S. 534 (1919); and *United States* v. *Northern Pacific Ry. Co.*, 254 U. S. 251 (1920). These cases will hereafter be referred to by the name of each of the respective railroad defendants.

In each one of these cases this Court had the opportunity to say that when the Act said "any train" it meant any combination of locomotive and cars, no matter how many or how few cars were involved, no matter how long or short a distance travelled, no matter what the type of movement, and no matter what work was being done.

This Court has not chosen to make such a sweeping definition of the word "train." It has, instead, properly recognized as being without the operation of the Act ". . . the various movements in railroad yards whereby cars are assembled and coupled into outgoing trains and whereby incoming trains which have completed their run are broken up . . .", *Erie* case, *supra*, p. 408, and those movements ". . . where the operation is that of switching, classifying and assembling cars within railroad yards for the purpose of making up trains . . .", *Northern Pacific* case, *supra*, p. 254.

This Court has also said that ". . . the controlling test of the statute's application is *the essential nature of the work done* . . .", (italics supplied), *Burlington* case, *supra*, p. 413 —and if the work done is assembling cars into outgoing

trains or breaking up incoming trains, then the Act does not apply, as the *Erie* case pointed out (p. 408):

> "[T]he various movements in railroad yards whereby cars are assembled and coupled into outgoing trains and whereby incoming trains, which have completed their run are broken up . . . are not train movements but mere switching operations and so are not within the air brake provision. . . ."

In each of these four cases the movements were determined to be transfer movements; that is, a movement of cars from one yard to another where, upon reaching their destination, the cars were turned over to another company or were sent to some further destination instead of having reached the ultimate consignee of the car.

But the cars in the movements now before the Court were switched from the classification yard and delivered to the ultimate consignees or were being picked up from the consignors' spur tracks for movement to the classification yard. After reaching the classification yard the switching continued and they were placed on tracks on which trains to run from Hopewell were being made up to go to Bellwood and thence to points north and south on the main line. The whole movement must be considered: its purpose, origin, and destination—not simply a portion of it. The essential nature of the work done cannot be determined merely by looking at the cars as they are moving; what happens to the cars when they stop moving is the test.

II.

The Government appears to contend that this Court's previous decisions as to what constitutes a train have carved an exception into the Safety Appliance Act, the purpose of

that Act being to make railroad operations safer for employees, passengers and the general public. The Government suggests that Congress could not possibly have intended the Court to make such exception in a safety statute where no statutory exemption was created. However, regardless of the purpose for which the Act was passed, it must be construed by the courts according to the language actually used in the Act.

This is not the case of judicial legislation, the Government implies. This Court, by its decisions, has not created an exemption in the Act. To the contrary, it has done what it was required to do: this Court's prior decisions have simply defined the word "train" as used in the Act, something Congress failed to do. To give the Act any efficacy whatever, the word "train" must be defined. Since Congress failed to define the term it became this Court's duty to do so.

This Court's definition of the word "train" was made more than forty years ago. Congress has not seen fit to change that definition, although there has certainly been abundant time to do so or, as the Government maintains, the definition is so contrary to Congressional intent. Furthermore, it has been over thirty years since the first lower court decision holding a particular movement a switching movement and not within the Act was announced, *United States v. Texas & N. O. R. Co.*, 13 F. 2d 429 (S. D. Tex. 1926). Since that decision, over a period of years, many cases have been decided holding given movements to be switching movements and exempt from the Act. If those cases had represented an erroneous reading of Congressional intent, Congress could have redefined the word "train." Congress having failed to do so the inescapable conclusion is that the term has been properly defined and the definition

properly applied by the courts. At this late date it is to Congress and not to the courts that Government must turn if a change in the definition of the word "train" is to be made.

III.

While it has been nearly forty years since the Court has considered a case arising under this section of the Act the lower Federal courts have frequently had this problem before them. Over this period the various lower courts have followed the ruling made by this Court in the *Erie* and *Northern Pacific* cases, *supra*, and have looked to the essential nature of the work in any given movement to determine whether that movement is subject to the Act.

Where it appears that the nature of the work done is the breaking up of trains and the switching of their cars to industrial spurs, or the reassembling of cars from various points in a yard to a central point where the cars are made up into a train for a road run, the courts have held that the movement is a switching movement not subject to the Act. This type of movement is precisely the type of movement which took place in Seaboard's Hopewell yard on March 5 and 6, 1956, and the District Court and the Court of Appeals properly held those movements without the purview of the Act.

On the other hand, the lower courts have been just as diligent to place transfer movements, that is, those movements where strings of cars are moved intact from one terminal to another or one yard to another, within the purview of the Act. Seaboard's movements in Hopewell are not transfer movements, for once a car in Hopewell is switched to its consignee it is at the end of its journey and is then loaded or unloaded and is not taken on a further journey.

The test of "the nature of the work done" established by this Court years ago is obvious, practical and workable. It has been properly applied by the lower courts in the past; it was properly applied by the lower courts in this case; and it requires no modification or revision now by this Court.

IV.

The Government, after first maintaining that there is no basis either in the legislative history or in the language of the Act to justify any exceptions to its coverage, nonetheless appears to accept, albeit reluctantly, the distinction made by the courts between those movements which because of their nature are subject to the Act and those movements which because of their nature are not. Having accepted this distinction the Government then maintains that the movements involved in this case were transfer movements and not switching movements.

The Government in its brief is in reality setting up a strawman to knock down. The Government dwells at some length upon the propositions that a movement can be subject to the Act even though main line tracks are not used and that a transfer movement is subject to the Act. We agree with those propositions in the abstract, but what the Government fails to do, and indeed cannot do, is apply those principles to this case. The Government talks about matters not germane to this case, while the facts of this case show the Act does not apply to the movements at bar.

The ultimate decision as to whether a particular movement is a transfer movement or a switching movement is a matter for the trier of the facts. In this area a decision in one case carries little weight as a rule for decision in another because the facts in each particular case vary so greatly. Each case must instead be decided on its own facts. The

decision of the trier of the facts below, sitting without a jury, is entitled to the same weight as a jury verdict, and such verdict may not be set aside unless clearly erroneous and without evidence to support it. The decision of the District Court, far from being clearly wrong, is clearly right and should be upheld by this Court."

ARGUMENT

I.

The Decision of the Court of Appeals for the Fourth Circuit Is in Accord With the Previous Decisions of This Court

When the Court of Appeals for the Fourth Circuit held that the four movements complained of in this case were switching movements and not subject to the air brake requirements of the Safety Appliance Act, that court properly relied upon, and applied, the prior decisions of this Court.

In each of the four cases previously decided by this Court the movements have been held to be within the Act. This Court has never, however, said that *any* movement of a locomotive and car or cars is a train and thus within the Act. It merely said that the movements there involved were trains. The Court was careful to point out in each of those decisions that, although the movements before it were trains, not all movements are trains. Because this Court has made no sweeping definition of "any train," as that expression is used in the Safety Appliance Act, it is necessary to look at the movements in those cases in some detail to see how they in fact differed from the movements in the case at bar, and how the language of those decisions applies to this case.

Seaboard's Hopewell yard consists of a classification yard at the west end of town where inbound trains are broken up.

In this yard the cars are then shifted so as to arrange them for convenient delivery to the Norfolk & Western interchange and the industries located on the nine other different spur tracks lying along the two miles between this yard and the Allied Chemical plant. Outbound cars are picked up at the consignors' spur tracks and Norfolk & Western interchange and assembled into trains for movement from the yard to the main line at Bellwood. All that Seaboard does in Hopewell is to switch cars to and from the classification yard and the industrial plants. No cars are transferred from the classification yard to another yard to be hauled away. When an incoming car is switched from the classification yard it is bound for its ultimate destination (never more than two miles away) where it will be unloaded or loaded. When a car coming from Seaboard's main line reaches the Hopewell classification yard it is truly at the end of the line, for there is no track beyond Hopewell, and cars only leave the classification yard to be switched to their ultimate destination—the industrial siding to which the cars are consigned. Outgoing cars are handled in the reverse manner.

In the *Erie* case, *supra*, the Erie maintained extensive yards in New Jersey just across from New York City. The movements complained of were between three yards, known as the Jersey City, Weehawken and Bergen yards, roughly situated as the outer points on a Y, lying from two to three and one-half miles apart. Movements between these yards were made over main line tracks. Cars hauled in the movements complained of to Jersey City and Weehawken from Bergen were forwarded to points around New York Harbor; cars hauled from Jersey City and Weehawken were forwarded to western points. In other words, in none of the movements involved in the *Erie* case had the cars reached their ultimate destination; they were being *transferred* from one yard to another for continuing further shipment else-

where. To the contrary the cars distributed by Seaboard in Hopewell are carried a short distance between a classification yard and an industrial plant where the cars are either unloaded or loaded or assembled into a train in the classification yard from there to be transferred to Seaboard's main line at Bellwood.

In the *Erie* case at p. 406, this Court said:

> "We cannot assent to the view that the yards at Jersey City, Weehawken and Bergen are but a single yard. They doubtless are important accessories to the defendant's eastern terminal, but that does not make them one yard. They lie from two to three and one-half miles apart, *are not so linked together that cars may be moved from one to another with the freedom which is usual and necessary in intra-yard movements*, and are in actual practice treated as separate yards." (Italics supplied)

While the Erie might not have the freedom of movement usual and necessary in intra-yard movements in Jersey City, Weehawken and Bergen, Seaboard certainly does in Hopewell. The only engines ever moving in Seaboard's Hopewell yard are switch engines picking up loaded or setting out empty cars for the consignor or consignee. There are no through trains within the yard limits, either passenger or freight, simply because there are no through tracks.

On the state of facts in the *Erie* case this Court found those movements subject to the Act. The Court said (pp. 407-8):

> "It will be perceived that the air-brake provision deals with running a train, while the other requirements relate to hauling or using a car. In one a train is the unit and in the other a car. As the context shows, a train in the sense intended consists of an engine and

cars which have been assembled and coupled together for a run or a trip along the road. When a train is thus made up and is proceeding on its journey it is within the operation of the air-brake provision. *But it is otherwise with the various movements in railroad yards whereby cars are assembled and coupled into outgoing trains and whereby incoming trains which have completed their run are broken up. These are not train movements but mere switching operations, and so are not within the air-brake provision. . . .*" (Italics supplied)

It would be hard to describe the movements complained of in this case more succinctly and accurately than in the italicized language set forth above from the *Erie* case. Incoming trains are brought into the classification yard and are broken up and switched to the various consignees; cars are moved from the various industrial sidings to the classification yard where they are assembled and coupled into outgoing trains. That is the extent of the movements complained of by the Government. Then, and only then, are they made up into a train within the sense of the Act. The court below clearly properly relied on the *Erie* case in holding the movements here outside the Act.

In the *Burlington* case, *supra*, defendant maintained freight yards in Kansas City, Mo., on both sides of the Missouri River. These yards were connected by a track over which main line passenger and freight traffic travelled. Cars were moved from one yard to the other where they were dispatched to their ultimate destination, either on defendant's road or that of other carriers. These movements were held to be transfer movements and subject to the Act. The movements in the *Burlington* case are certainly completely dissimilar to those involved in the case at bar. In our case the cars were not transferred from one yard to

another over main line tracks but were simply being switched within the yard after the train had arrived and been broken up to the consignees or from the consignors to the tracks on which outgoing trains were made up.

It was in the *Burlington* case that this Court announced the test of the applicability of the Act. The Court said there (p. 413):

> ". . . Neither is it material that the men in charge were designated as yard or switching crews, for *the controlling test of the statute's application lies in the essential nature of the work done* rather than in the names applied to those engaged in it." (Italics supplied)

We submit this test is clear and free from ambiguity and was properly applied by the court below when it held (R. 70) that the nature of the work done at Hopewell is clearly switching.

That the nature of the work done is the test of the Act's applicability was emphasized by this Court in its next decision on the Act, the *Louisville & Jeffersonville* case, *supra*, where it was said (pp. 539, 540):

> "This case falls within the scope of *United States* v. *Erie R. R. Co.* . . . and *United States* v. *Chicago, Burlington & Quincy R. R. Co.* . . . in the latter of which it is said that 'the controlling test of the statute's application lies in the essential nature of the work done.' ".

The *Louisville & Jeffersonville* case involved movements of cars between the Chesapeake & Ohio and Big Four railway systems at one end of the Bridge Company's yards and the Illinois Central system at the other end. These movements were obviously transfer movements between two railroads by a third and in nowise begun or terminated with

the Bridge Company. While the movements are clearly distinguishable from those involved here, the case nevertheless has value as a precedent because of this Court's reiteration that the test of the Act's application is in the essential nature of the work done.

The last case heard by this Court, the *Northern Pacific* case, *supra*, was briefed and argued almost entirely on the proposition that the Act does not apply to movements which do not take place on main line tracks. The movements in question were transfer movements between two separate yards in Duluth over a distance of four miles, totally dissimilar from the movements at bar. This Court, holding for the Government, said that movement over main line tracks was not prerequisite to the Act's application (p. 254):

> ". . . But there is nothing in the act which limits the provision here in question to operations on main line tracks. The requirement that train brakes shall be coupled so as to be under engine control is in terms (32 Stat. 943) applicable to 'all trains . . . used on any railroad engaged in interstate commerce.'"

We cheerfully agree that whether main line tracks are used or not is not controlling. In some cases movements on other than main line tracks are held to be subject to the Act, while in others movements on main line tracks are held not to be subject to the Act. For example, in *United States v. Texas & N. O. R. Co.*, 13 F. 2d 429 (S. D. Tex. 1926), District Judge Hutcheson, now Chief Judge of the Court of Appeals for the Fifth Circuit (and incidentally a first cousin of the trial judge in this case), held the movements in that case were switching movements despite the fact that they took place on main line tracks. Judge Hutcheson, following this Court's mandate and looking to the essential

nature of the work done, found that the movements whereby cars were moved from a yard and distributed to various industrial spurs along the main line were switching movements. This is precisely the case now before the Court except that the movements were not on a main line but at the end of the line beyond which there were no tracks.

There can be no real dispute that the essential nature of the work done is the controlling test and that if the work done is switching the Act does not apply. The Government seeks to avoid the logical result of applying this rule to Seaboard's Hopewell movements by urging that what was done with the cars before or at the end of their runs is immaterial. But this cannot be so, for how else is one ever able to tell what is the essential nature of the work being done unless the whole movement, from beginning to end, is considered? A group of cars passing a given point on a given track might be assembled and made up for a road run and subject to the Act, or it might simply be in the process of being switched to an adjacent track and not subject to the Act. The *whole* movement must be considered, and the whole movement in this case is a switching movement.

In *United States* v. *Great Northern Ry. Co.*, 73 F. 2d 736 (9th Cir. 1934), *cert. den.* 295 U. S. 752 (1935), the Government urged the court to consider only a portion of the work done by a switching crew in a particular movement to determine whether the Act applied. The court rejected the Government's position, saying, at p. 739:

> "Applying the criterion evolved from the decisions of the Supreme Court of the United States that 'the controlling test of the statute's application lies in the essential nature of the work done' the facts warranted the finding that the crew at the time was engaged in the assembly of cars by means of a series of switching

movements, and that at the time complained of the cars had not been assembled into a train to be transferred as such to any particular point. *The government sought to establish a "train movement" by presenting only a part of the work being done by the engine and crew, and disassociating it from the surrounding circumstances.* . . .

"*Had the government inspectors continued to observe the engine and crew in order to ascertain the 'essential nature of the work being done,' they would have learned, as the undisputed testimony shows, that after the engine had transported the cars to the point where the inspectors had discontinued their observations, the switching of cars was resumed.* . . ." (Italics supplied)

Looking at these movements as a whole and not in isolated segments it is clear, we submit, that the essential nature of the work done was switching and that the court below properly ruled that the movements were not subject to the Act.

II.

The Courts Have Properly Observed the Intention of Congress in Interpreting That Portion of the Safety Appliance Act Requiring Any Train to Have Connected Power Brakes to Exclude Switching Movements.

There is no question that the Safety Appliance Act requires "any train" to have connected air brakes. There is no question that the courts have held certain movements of engines and cars not to be "trains" and therefore not subject to that requirement. It does not follow from this, however, that the courts have disregarded the Act and the will of Congress.

The Government argues in its brief that the Act excludes "trains composed of four-wheel cars" and "trains composed

of . . . standard logging cars. . . ." It must follow, according to the Government, that these are the only exceptions to the Act and that there is no authority for excluding any other type of train from the Act's operation. But it is to be noted that the Act refers to *trains* of four-wheel cars and logging *trains*. The fact that Congress has seen fit to exclude *trains* composed of certain types of cars from the Act still leaves unanswered the question: What is a train? Congress having failed to define the word train, it becomes the duty of the courts so to do.

If "train" were a word which had only one meaning, and that meaning were understood by everyone, there would be no need for a judicial definition of the term. But there has been considerable controversy in the past as to what a train is, and judicial definition has been necessary.

In the *Erie* and *Burlington* cases, *supra*, the first cases to reach the Supreme Court on this point, the railroads in their briefs urged the Court to accept as a definition of "train" that used by the American Association of Railroads:

> "Train. An engine or more than one engine coupled, with or without cars, displaying markers." *

The Court refused to accept that definition of a train, even though that was the definition known and understood in the railroad industry. Instead, the Court by applying common sense and considering the intent of the Act evolved the definition of the word train set forth above. The fact that the American Association of Railroads defines a train one way and the courts another indicates the diversity of opinion as to the meaning of the word and points up the necessity for this Court's having to define the term in the

* Standard Code of Operating Rules adopted by the Association of American Railroads (Revised to October 1, 1953), p. 11.

absence of any definition by Congress. That definition is logical and workable and was correctly applied by the court below in this case.

The Government appears to prefer the opinion of I. C. C. Inspector Meyrick, who testified in this case, as to what constitutes a violation of the Act, to the opinion of the courts below. Yet Meyrick's own testimony indicates how vague and uncertain he was as to the proper application of the Act (R. 32-35):

> Q. Mr. Meyrick, are there any instructions to you from the Interstate Commerce Commission as to what is to determine whether a movement is a switching movement or a train movement?
>
> A. As you have pointed out, it is very poorly defined, but it is our opinion that any movement of a substantial number of cars between two points with stops en route to set out or pick up would be deemed a train movement.
>
> * * *
>
> Q. . . . Are there any rules or regulations or anything published by the Interstate Commerce Commission for your information?
>
> A. No, sir.
>
> Q. Or for the information of the railroads?
>
> A. No. For that matter it is my understanding that these cases are based upon past court decisions, and that is about all I have as a guide.
>
> * * *
>
> Q. As I understand it from reading your report, you disregarded the movements to Hercules and Celanese because they were under one mile in length?
>
> A. They were short movements, yes.
>
> Q. At what distance, then, does a movement become a train movement and not a shifting movement?
>
> A. There again there is no hard and fast rule.

Q. There are shifting movements of two miles in length, are there not?

A. There could be.

The Government further contends that the Act was enacted primarily for the safety of railroad employees and that the court below and the other courts which have found certain movements to be outside the Act have by excluding those movements from the Act ignored the intent of Congress to protect railroad workers.

The error of this position is demonstrated by the debates on the Act prior to its enactment. It was pointed out and meticulously debated in Congress that the Interstate Commerce Commission safety records relied on by the House committee showed that the greatest number of accidents to railroad employees from any one cause were from switchmen having to go between cars to couple up air brakes. The requirement of connecting air brakes was described as for the safety of the brakemen on the cars but at the expense of the safety of the switchmen on the ground (36 Cong. Rec. 2521, 2522). In making the Act applicable solely to "trains" it seems obvious that it was the intent of Congress to avoid subjecting switchmen to unnecessary risks by not requiring air brakes to be coupled in switching movements.

The most persuasive argument, however, that the Act is being construed according to the will of Congress is the absence of any amendatory legislation in the forty year period since this Court announced its decisions as to the applicability of the Act. Congress has had forty years to define the word train in the Act in any manner it desired if this Court's definition was erroneous. The failure of Congress to act is certainly an implied recognition that this Court's construction is the correct one.

In *Apex Hosiery Co. v. Leader*, 310 U. S. 469 (1940),

this Court was called upon to decide the applicability of the Sherman Act to certain labor union conduct. The question arose whether Congress had acquiesced in previous decisions on the same point by not enacting legislation to correct the interpretation this Court placed on that aspect of the Sherman Act. This Court held (pp. 488-9):

> "... The long time failure of Congress to amend the Act, after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one. ..."

The Government cannot be heard to say that, although this Court's prior decisions have been acquiesced in by Congress, the decisions by lower courts holding particular switching movements outside the Act have not. A third of a century ago a district court held a switching movement outside the Act, *United States* v. *Texas & N. O. R. Co.*, 13 F. 2d 429 (S. D. Tex. 1926); a quarter of a century ago the Ninth Circuit found a switching movement outside the Act, *United States* v. *Great Northern Ry. Co.*, 73 F. 2d 736 (1934), *cert. den.* 295 U. S. 752 (1935). Since that time numerous other decisions, discussed *infra*, have found certain movements to be outside the Act.

Congress has certainly had abundant time to indicate its disapproval of these decisions if in fact they were erroneous. The only conclusion is that the Act has been properly construed by the courts. If the United States or the Interstate Commerce Commission feel that the construction given the Act by this Court and the lower courts is unworkable or improper correction should be made by Congress and not by this Court. The construction of the Act made by

the court below accords with the intention of Congress as set out in the opinions of this Court and should be affirmed.

III.

The Lower Courts Are Properly Applying the Tests Laid Down by This Court in Its Previous Decisions to Determine When the Act Applies; the Court of Appeals for the Fourth Circuit Properly Applied Those Tests in the Case at Bar.

Although this Court has not considered an air brake case since 1920 many such cases have arisen in the lower Federal courts, and where they have arisen the courts, looking at the essential nature of the work done to determine whether a given movement is a switching, classifying, and assembling movement or a transfer or train movement, have decided whether the Act applies to the particular situation before them.

In *United States* v. *Great Northern Ry. Co.*, 73 F. 2d 736 (9th Cir. 1934), *cert. den.* 295 U. S. 752 (1935), *supra*, cars after having been assembled and connected together were moved one and one-half miles and then switched before being taken on a road run. The Ninth Circuit held that the movement prior to the road run was a switching movement, *supra*, at p. 739:

> "Applying the criterion evolved from the decisions of the Supreme Court of the United States that 'the controlling test of the statute's application lies in the essential nature of the work done,' the facts warranted the finding that the crew at the time was engaged in the assembly of cars by means of a series of switching movements, and that at the time complained of the cars had not been assembled into a train to be transferred to [illegible] particular point."

> ". . . [A]fter the engine had transported the cars to the point where the inspectors had discontinued their observations, the switching of cars was resumed . . ."

The movement in the *Great Northern* case is the same as those movements at bar whereby cars were switched from the Allied Chemical plant to the classification yard and there assembled into a train to be hauled to Bellwood, on Seaboard's main line. The essential nature of the work done in the *Great Northern* case was switching; the essential nature of the work done here is switching.

United States v. *New York, Chicago & St. Louis R. Co.*, 77 F. 2d 215 (7th Cir. 1935), involved a movement of one and one half miles over yard tracks. The string of cars was moved intact, but the engine was uncoupled along the route to switch a car not a part of the string. The court looked to the essential nature of the work done, found the work done was switching, and held the movement not subject to the Act.

United States v. *Chicago, B. & Q. R. Co.*, 190 F. 2d 223 (7th Cir. 1952), *cert. den.* 345 U. S. 908 (1953), was an appeal from two different lower court decisions combined on appeal involving the same railroad. The movements involved in one case were between one freight yard, where incoming trains terminated and outgoing trains were assembled for yard movement, and an adjacent storage yard, a distance of one and one half miles. The movement involved in the other case was for slightly more than two miles from the freight house, where outgoing cars were picked up, to a point where they were incorporated into trains. No cars were set out or picked up in the movements. The court held that these movements were switching movements and thus not within the Act.

Three recent decisions in Courts of Appeal have held the movements before them, because of distance, hazards, and

similar factors, train or transfer movements and within the Act. *United States* v. *South Buffalo R. Co.*, 168 F. 2d 948 (1948), *cert. den.* 335 U. S. 870 (1948), *United States* v. *Panhandle & Santa Fe Ry. Co.*, 203 F. 2d 241 (5th Cir. 1953), and *United States* v. *Thompson*, 252 F. 2d 6 (8th Cir. 1958). The *South Buffalo* and *Thompson* cases do not even refer to the test of looking to the essential nature of the work done to determine whether the particular movements were switching movements, and the *Panhandle* case alludes to the test only perfunctorily. Had they considered this test, it is highly probable different conclusions might have been reached.

But this Court established the nature of the work done as the test in the *Burlington* case, *supra*, and reaffirmed it in the *Louisville & Jeffersonville* case, *supra*. That is the test properly applied by the court below when it said (R. 69):

> "The movements here were not over main line tracks, nor even inter yard connecting tracks. They moved, entirely within the confines of one yard, over a lead track only two miles long from which there sprang nine spurs and an interchange track. Since the nature of the work was clearly the distribution and collection of cars following the breakup of trains and preparatory to the make up of others, we are convinced they were switching operations, exempt from the requirement of train brakes."

United States v. *Elgin, Joliet & Eastern Ry. Co.*, 182 F. 2d 1 (7th Cir. 1950), is closer factually to the case at bar than any other case so far decided. That case involved the Joliet's operations in Gary, Indiana. The Joliet's main line tracks end at its Gary yard. The yard is maintained to serve two large industries adjacent to the yard, just as Seaboard's Hopewell yard is maintained to serve the numerous indus-

tries adjacent to its yard. The movements complained of were from one part of the yard to another and involved movements of from 47 to 84 freight cars without air brakes for distances up to 2.1 miles. So far as the record shows there were no cars added or dropped during the movement. The court, in finding these to be switching movements, looked to the nature of the railroad's operations in Gary to see what work was being done (p. 4):

> "It appears to us that the entire business of the Gary Yards, considered as a whole, is in the nature of a continuous switching operation. While it is true that the particular movements singled out here involved cuts of cars moving as units without interruption for distances, which under the circumstances of other cases referred to were held to justify the application of the Act, we think no such occasion arises here for applying the Act. Here we have a large yard divided into a large number of sub-yards, and necessarily, movements within this yard and between the sub-yards involved long hauls. But using the criteria which we think are to be derived from the cases cited, we are convinced that the 'essential nature of the work' remained the 'switching, classifying and assembling (of) cars within railroad yards for the purpose of making up trains' 'for a run or trip along the road' and not such a 'run or trip' as required compliance with § 9 of the Act."

The court below similarly looked at the entire business of the Hopewell yard as a whole, found such business to be switching, and properly excluded the questioned movements from the Act's application.

United States v. *Terminal Railroad Association of St. Louis*, 260 F. 2d 884 (7th Cir. 1958), *cert. pending*, is the most recent appellate decision concerning this part of the Act. Four movements, from one and three-quarters miles

to two and three-quarters miles in length, were involved on appeal. The movements were between two of the railroad's yards preparatory to switching cars to the industries in the area, and in only one of them were any cars set out or picked up. The court held the movements to be switching movements, saying (p. 886):

> "A moving locomotive with cars attached is within the provision of the Act only when it is a train. There is no definition of 'train' in the Safety Appliance Act. However, it has been held that where the operation is that of switching, classifying and assembling cars within railroad yards for the purpose of making up a train, the movement is not a train."

We submit that the Courts of Appeal are not misconstruing this Court's prior decisions, as the Government maintains, but as the foregoing cases show, are correctly applying the Act to the cases before them.

IV.

Whether a Particular Movement Is a Transfer Movement or a Switching Movement Is a Question To Be Determined by the Trier of Fact.

The Government in its brief, after finally recognizing that a distinction is properly made between transfer movements and switching movements (p. 21 et seq.), finds it necessary to lift itself by its own bootstraps and does so by persisting in calling the movements in the case at bar "transfer trains". The Government's argument is that since these are transfer trains the court below erroneously applied the law when it exempted the movements from the Act's coverage. The Government's position would be well taken if the movements were transfer trains, but merely saying they are

transfer trains does not make them transfer trains. The Government fails to do what both the District Court and the Court of Appeals in this case have done: the Government does not look to see what is the essential nature of the work done but looks at only a small, isolated sector of the operation.

The movements complained of are not transfer movements. A transfer movement by its very terms means a movement between two points preceded and followed by other movements. The movements here involved are not movements between two yards, or two terminals, as in transfer movements; they are movements over a lead track, an interchange track and industrial spurs. As expressed by the court below:

> "* * * The lead track, the spurs that break from it and the classification yard are all parts of one yard, and its extremities are not so distant as to deprive a movement from one end of the yard to the other of the flavor of its function in breaking up and making up trains." (R. 68)
>
> "* * * Movement over the lead track, from one spur requiring attention to the next, are an inseparable part of the switching activity, when the lead track is used, in fact, as an integral part of a yard in which the cars have been received or from which they are to be dispatched." (R. 70)

That the tests laid down by this Court in all its prior decisions were properly applied below clearly appears from the following language of the Court of Appeals:

> "Since the nature of the work was clearly the distribution and collection of cars following the breakup of trains and preparatory to the make up of others, &c

> are convinced they were switching operations, exempt from the requirement of train brakes." (R. 69)

The very nature of the railroad industry dictates that each yard is different from any other yard. Thus the facts of each case become of crucial importance, and great weight must be given the decision of the trier of the facts. As was pointed out in *United States* v. *Chicago, Burlington & Quincy Ry. Co.*, 199 F. 2d 223 (7th Cir. 1952), *cert. den.* 345 U. S. 908 (1953), *supra*, at p. 226:

> "Neither Congress nor the Interstate Commerce Commission has seen fit to define the meaning of the word 'train' as employed in the Act. This perplexing problem unfortunately, so we think, has been left to the courts. After wrestling with it some fifty years, courts have accomplished little other than to decide on the particular facts of each case whether the movement was that of a train within the meaning of the Act. It is apparent, therefore, that a holding in one case carries little weight as a rule for decision in another. Even when the facts of the case are disclosed, the question must depend largely upon the opinion or judgment of the court called upon to make the decision. And where the facts bring the case within the twilight zone, as we think they do in the cases before us, the opinion of one judge or court is likely to be as good as that of another."

District Judge Hutcheson, the trier of the facts in this case, sitting without a jury, found that the movements complained of by the Government were switching or shifting movements and did not constitute violations of the Safety Appliance Act.

To support the allegations of the complaint, the Government produced two witnesses both of whom were employed

by it as Inspectors of Safety Appliances for the Interstate Commerce Commission, Charles R. Meyrick, with two and one half years' service (R. 16), and Chester E. Roy, with six years' service (R. 41). Inspector Roy did not testify at length but merely said, "My testimony will substantiate his (Inspector Meyrick's) testimony in regard to these particular movements, but there are one or two items that I would not substantiate; that is, all these various questions" (R. 42).

As to the facts with regard to the location of the tracks, industries, crossings and the movements involved there was no material difference between the evidence for the Government and that for the railroad.

Rather the difference was in the conclusions drawn from that evidence by the two Government inspectors and the expert witness for the railroad, Mr. Joseph R. Hoag, who prior to his retirement had been an Inspector of Safety Appliances for the I. C. C. for thirty-two years.

His duties with the I. C. C. were the same as those of the Government's witnesses, Messrs. Meyrick and Roy, but he had the advantage over them of enforcing the provisions of the Safety Appliance Act for nearly four times as long as the combined service of both of the Government witnesses.

The basis for his conclusion that movements in the Hopewell yard similar to those here in question were switching movements are concisely stated in his testimony at p. 50 of the transcript as follows:

> "Q. What were the factors that led you to that conclusion?
>
> "A. Well I figured it was merely a switching movement for the distribution of cars to the different industries around Hopewell and was controlled by yard speed, which was a speed that enabled them to stop

within one-half the range of vision. I believe two railroads crossed at grade. Those railroads were spur tracks of the other line and they were protected by fixed signals, namely, a stop board on that line where their trains had to stop before crossing over the Seaboard tracks; the Seaboard had the right of way. The most important crossing was protected by gates. The other crossings were protected by railroad crossing signs, what we call cross-buck signs, and the speeds being so slow and the number of cars—I asked about the average number of [fols. 114-115] cars that were handled in the train and they said it would run around twenty-five cars, the average number, and moving at yard speed. I figured the engineman could control the speed of the train and stop within one-half his range of vision and there would be no danger in the movement."

It is striking that the Government in its brief takes no issue with any finding of fact by the trial court.

Rule 52, Federal Rules of Civil Procedure, provides, in part:

"Findings by the Court.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial judge to judge of the credibility of the witnesses. . . ."

The Government fails to point out any single one of Judge Hutcheson's findings of fact is erroneous and in what respect it may be in error. If the findings of fact are correct and supported by the evidence, then it must follow that the Court of Appeals for the Fourth Circuit properly affirmed the trial court, for the determination of what work a given

movement is performing is a question of fact, and what work is performed is the test of the Act's applicability.

The Government maintains that the court below erred by abandoning the test of whether a train was involved and instead deciding the case on the absence of main line tracks and on specific elements of danger. We submit that the court below did not decide the case on those issues but instead properly decided the case on the basis of the tests laid down by this Court when it said (R. 69):

> "The movements here were not over main line tracks, nor even inter-yard connecting tracks. They moved, entirely within the confines of one yard, over a lead track only two miles long from which there sprang nine spurs and an interchange track. *Since the nature of the work done was clearly the distribution and collection of cars following the breakup of trains and preparatory to the make-up of others, we are convinced they were switching operations, exempt from the requirement of train brakes.*" (Italics supplied.)

With respect to the decision in favor of the railroad in the Court of Appeals, let us point out that Chief Judge Sobeloff concurred with the majority as to one of the movements involved, Count 3, and dissented as to three, Counts 1, 2 and 4. As to Count 3, he concurs with the majority but nowhere in this dissent is there one word to be found as to the basis of the distinction which he makes between the movement involved in this count and those involved in the other three! The only clue is to be found in a foot note where it is said:

> "Although there was a conflict in the evidence whether one or two of the movements were interrupted by switching operations en route, the District Judge

resolved the conflict by finding a stop for switching in only one of the four, the one alleged as the third violation." (R. 73)

The dissenting opinion below is based almost entirely on a consideration of the hazards involved in Seaboard's Hopewell operations. Totally aside from the fact that the record discloses a remarkable safety record and that the movements would not have been less hazardous to employees or the public if air brakes had been used, the presence or lack of hazard has never been the controlling test of the Act's application. Yet the Government itself contends that it is erroneous to consider elements of danger (Br. 44 et seq.). The dissenting opinion errs in failing to look to the nature of the work done and instead making the test of the Act's application the hazard involved in a particular movement. The majority opinion correctly points out (R. 70) that a switching operation does not cease to be a switching operation merely because it crosses a highway or spur track.

From the time of the construction of the Hopewell line in 1931 or 1932 (R. 49) until September 7, 1951, air brakes were not used on these movements. Their use was discontinued "mostly for operating reasons" January 10, 1950 (R. 50). Yet there is nothing to show that at any time during this period the Government considered similar movements as "train" movements within the prohibition of the Safety Appliance Act.

Likewise, it appears that daily "ten moves are made between these various industrial locations and the yard" (R. 51). I. C. C. Inspectors Meyrick and Roy were here for two days. Yet of the 20 movements which the inspectors should have observed in those two days the Government filed suit with respect to only four. Is it unreasonable to

inquire as to why and wherein lay the distinction from the other sixteen?

A few words in a speech or a book lifted out of their context may have a meaning diametrically opposite that of the author. In this case the Government lifts out of its context the movement between the classification yard and delivery to the industrial spurs, ignoring the shifting that occurred at both ends beyond the arbitrary points selected by it and, in one case, in the middle of one of these alleged "train" movements.

We submit that Judge Hutcheson's findings, far from being clearly erroneous, are plainly right. They were affirmed by the Court of Appeals for the Fourth Circuit in a thorough and well reasoned opinion, and they should be affirmed by this Court.

CONCLUSION

This Court in its prior decisions has held that movements whereby railroad cars are switched, sorted, classified or assembled are not trains, as that word is used in the Safety Appliance Act. Consequently, cars in such movements are not required by the Act to have their air brakes coupled for operation. In order to determine whether a particular movement is a switching movement the essential nature of the work done in the whole movement—not just a part of it—must be considered. This interpretation of the Safety Appliance Act is in accord with the will of Congress in enacting the Act. The Act was never intended to encourage featherbedding, to require railroads to hire men where none were needed.

The District Court for the Eastern District of Virginia and the Court of Appeals for the Fourth Circuit in affirming

CONTINENTAL CAN CO.

END SAL - MP 23+5205

PARCEL NO 4

PARCEL A

LEAD TRACK TO CONTINENTAL CAN CO.

PARCEL NO 3

PARCEL B

LEAD TRACK TO ALLIED CHEMICAL AND DYE CO.

ROAD CROSSING STD. FIXED SIGNS

PARCEL NO 1

PARCEL C

ROAD CROSSING STD. FIXED SIGNS

PARCEL D

ROAD CROSSING STD. FIXED SIGNS

ROAD CROSSING MANUAL GATES

MP 23

TRACK 5
TRACK 3
HOPEWELL YARD

PARCEL T

PARCEL F

ROAD CROSSING

PARCEL H

PARCEL E

ROAD CROSSING STD. FIXED SIGNS

LAYOUT
HOPEWELL, VA.

SCALE : 1" = 200'

PART OF CHIEF ENGINEER'S DWG. 12081